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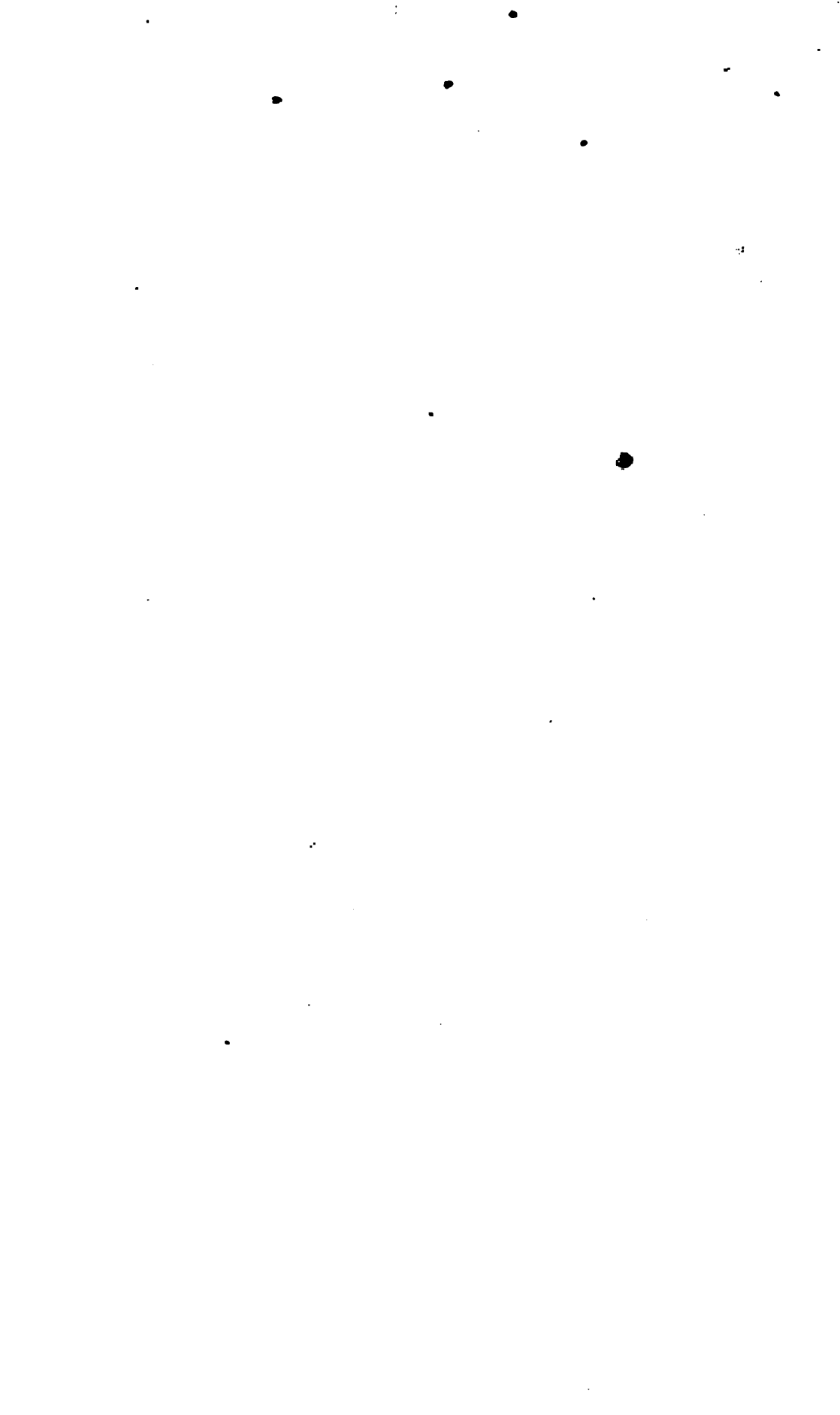
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IRISH COMMON LAW REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS,
EXCHEQUER,

EXCHEQUER CHAMBER, AND COURT OF CRIMINAL APPEAL,

DURING THE YEARS 1863, 1864 AND 1865.

Queen's Bench;

BY WILLIAM BARLOW, ESQ. & J. LOWRY WHITTLE, ESQ.

Common Pleas;

BY SAMUEL V. PEET, AND JOHN HEZLET, ESQ.

Exchequer;

BY CHARLES H. FOOT, ESQ.

Exchequer Chamber;

BY JAMES LOWRY WHITTLE, SAMUEL V. PEET, ESQ.
AND CHARLES H. FOOT, ESQ.

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RICHARD JOHNSON
 v.
 THE LORD MAYOR OF DUBLIN.*

(*Queen's Bench.*)

1864.
Queen's Bench
 June 8, 9, 23,
 24.

In Hilary Term (January 30th) 1864, the Court granted a conditional order to erase from the burgess-roll of the borough of Dublin the names of Robert Fitzgerald, John M'Mullen, Edward Mellon, and Michael Hogan, on the grounds that no one of them occupies within the borough premises sufficient to qualify him to be a burgess thereof; and that those names should not have been retained on the burgess-roll at the last revision.

This motion was substantially an appeal from the decision of the late Lord Mayor and his two assessors, constituting the Court for revising the burgess-roll of the borough of Dublin, who had, in the month of November 1863, inserted these four names in the burgess-roll.

The main question in the four cases was, whether a burgess

A man who, being rated for premises in the city of Dublin, which include a "house, warehouse, counting-house or shop," and having the other necessary qualifications, parts with the possession of the whole or of part of such premises other than the "house, warehouse, counting-house or shop," does not thereby disentitle himself to have his name inserted in the burgess-roll.

self to have his name inserted in the burgess-roll.

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must, in order to qualify him to have his name inserted in the burgess-roll of the borough of Dublin, have in his own occupation the whole of the premises for which he is rated; or whether he may sublet a portion of those very premises, and yet retain his franchise?

From the affidavits the following facts in the respective cases are taken. It was admitted that, in point of time, the occupation was sufficient in all the cases.

Robert Fitzgerald claimed as occupier of the house and premises No. 137 Townsend-street, which are rated as follows:—"1507. "Townsend-street, door No. 137, house and yard, Robert Fitzgerald, £10, from 1st of January 1861." The cellar belonging to Fitzgerald's premises was in the occupation of a tenant, and had no internal communication with the remaining portions of the house; but was entered from Townsend-street by an entrance distinct from that entrance in Townsend-street by which access to the other portions of the house was obtained. The tenant of the cellar sleeps in it.

The shop, and a parlour at the rear of the shop of the same house, were also let to another tenant, who had sole control over them. They likewise were entered from Townsend-street by an entrance distinct from that by which the cellar is entered, and also distinct from the entrance which leads into the other parts of the house. The tenant of the shop and parlour closes the shop from the inside; passes thence to the parlour, out of which he proceeds by a door leading into the hall of the house; and leaves the house by the hall-door. When the shop-door is so fastened, the hall-door is the only entrance from the street to the house or shop.

John M'Mullen was rated thus for the house No. 2 Merrion-row, out of which he claimed:—"Rate 965, Door No. 2, John M'Mullen, yearly value £58." He occupied the house under a lease of the 16th of April 1860, and had let the shop to one Elijah Dunne, who does not sleep there, but at night fastens the door of the shop by locking it on the outside, and taking away the key. There is no internal communication between the shop and the remainder of the house; and the shop is entered from

Merrion-row by an entrance distinct from that which admits to the rest of the house. Over the shop M'Mullen has no control.

Edward Mellon's rating for the house No. 20 Lincoln-place was in these words:—"Rate No. 814, Edward Mellon, value £36." Mellon let the shop to one Daniel North, before March 1863, when North became tenant of the drawing-room, in addition to the shop; and since then he has generally slept in the drawing-room. North fastens the shop-door inside, and passes thence to a parlour at its rere, whence he passes by a door, which he locks after him, into the hall of the house. Before March 1863, North used to lock the parlour-door, and take away the key, leaving the house by the hall-door. When the shop-door was so fastened, access to the house or shop could be had only by the hall-door, by which North had a right to enter; but Mellon could not enter the shop except by North's permission.

Michael Hogan was rated thus as occupier of the house and yard No. 32 Baggot-street Lower:—"Rate No. 101, Michael Hogan and Michael Joseph Hogan, value £48," in the year 1861; and in the year 1862, value £45; also at rate No. 101, office, stable, rated at £3, commencing 1st of January 1862. About the month of April 1861, Michael Hogan let the stable to a tenant, who uses a separate entrance to the stable. This entrance is in the lane at the rere of the house.

To the retention on the burgess-roll of the name of each of these four burgesses the objection was, that the ratings comprehended the whole of the premises to which respectively they applied. In each instance the late Lord Mayor and his assessors disallowed the objection, and retained the name on the burgess-roll.

Against those decisions the appellant Richard Johnson, a burgess of the borough, now appealed by this motion to erase those four names from the roll.

Macdonogh (with *Chatterton* and *Norwood*), for the appellant, contended that the names should be erased, inasmuch as the rating and occupation of the premises must be co-extensive in point of space, as well as in point of time; but the amount of rating has

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been made immaterial in Dublin, under the 12 & 13 *Vic.*, c. 85. The occupation must be co-extensive with the rating during the whole of the time necessary to give the qualification to vote: *The Queen v. The Mayor of Belfast* (a); *Wauchob v. Reynolds* (b). Hogan, for instance, having let the stable, loses the franchise, because he was rated in respect of the *entire* of the premises, and has nevertheless parted with the occupation of a portion of them.—[O'BRIEN, J. There is no doubt, however, that Hogan occupies the whole of that which was essential to give him the franchise, namely, the "house," although that house was rated in conjunction with something else, namely, the stable.]—But the language of the 12 & 13 *Vic.*, c. 85, s. 3, like that of the 3 & 4 *Vic.*, c. 108, s. 30, upon which the case of *Wauchob v. Reynolds* was determined, requires the party to occupy the *whole* of the premises for which he is rated:—"Every "male person of full age, who, on the last day of August in any "year, shall have occupied any house, warehouse, counting-house or "shop, within such borough of Dublin during that year, and the "whole of each of the two preceding years." In the other three cases also part of the premises are not now occupied by the party rated. Occupation of a house does not mean in law an actual residence in the house; it means that the party occupies *all* the house, just as well as if he slept there: *Fludier v. Lombe* (c); *The Queen v. The Mayor of Eye* (d); *Cook v. Humber* (e); and *Wright v. The Town-clerk of Stockport* (f).—[FITZGERALD, J. If a man occupies a large building, and separates it so as to make of it two separate and distinct buildings, one only of which he occupies, does he lose his franchise because he ceases to occupy the other?]
 Yes; the premises rated and those occupied must be identical: *Wauchob v. Reynolds*; *Rez v. Fryer* (g); *Ryan v. Bates* (h). It would be contrary to the Act to hold that a man, who has let part of the rated premises, is still in occupation of the premises for which he was rated.

(a) 8 Ir. Jur., N. S., 29.

(b) 1 Ir. Com. Law Rep. 142.

(c) *Cas. temp.* C. J. Hardwicke, 307. (d) 9 Ad. & Ell. 670, 677.

(e) 1 K. & Gr. Reg. Cas. 424; S. C., 11 C. B., N. S., 46.

(f) 5 C. B. 33.

(g) 4 B. & Cr. 961, note b.

(h) 6 Ir. Jur. 57.

Devitt contra.

In favor of the franchise the statute must be construed strictly: *Fludier v. Lombe* (a). The rating and occupation need not be co-extensive in point of space: *Henrette v. Booth* (b); *Cook v. Humber* (c); *Bryan Kearney's case* (d); *Wright v. The Town-clerk of Stockport* (e); *Pitts v. Smedley* (f); *Wansey v. Perkins* (g). The franchise therefore is not lost if the sub-occupant is merely a lodger; or if he occupies a portion which is completely severed from the remainder of the rated premises. *The Queen v. The Mayor of Belfast* (h) is not an authority for the appellant. That case was decided on the ground that the claimant had parted with the occupation of a portion of the premises for which he was rated in a borough in which the premises out of which the franchise is claimed must be rated to a certain value. The franchise may be derived from a joint occupation: *The Queen v. Deighton* (i).

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Chatterton, in reply.

That the occupation must be sole and exclusive was taken for granted in *Duigenan's case* (k); *Bryan Kearney's case*; *Wauchob v. Reynolds* (l); though the occupation of a lodger is no doubt that of the claimant. The language of the 12 & 13 Vic., c. 85, s. 3, shows that it was not intended that the franchise should be acquired by the occupation of different tenements in a single house, unless they were so severed from each other as to constitute distinct buildings. The occupation must under that Act be of the identical thing for which the rating exists. It is impossible to consider any of these cases as that of a lodger, or to hold that the claimants are in exclusive occupation of the rated premises.

Cur. ad. vult.

(a) *Ubi sup.*

(b) 15 C. B., N. S., 500.

(c) *Ubi sup.*

(d) 1 Alc. Reg. Cas. 22.

(e) 5 C. B. 33; S. C., 1 Lutw. Reg. Cas. 32.

(f) 7 C. B. 85.

(g) 7 C. B. 151.

(h) 8 Ir. Jur., N. S., 29.

(i) 1 Dav. & Mer. 632.

(k) 1 Alc. Reg. Cas. 114.

(l) *Ubi sup.*

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June 24.

O'BRIEN, J.

In this case a conditional order was obtained by appellant, to expunge the names of the four respondents from the burgess-roll of the city of Dublin, as not being duly qualified under the provisions of the Dublin Municipal Act of 1849 (12 & 13 *Vic.*, c. 85, s. 3), which requires, as necessary qualifications for the burgess franchise, that the party claiming it in any year should, on the 31st of August in that year, have occupied "*a house, warehouse, counting-house, or shop*" in Dublin "*during that year, and the whole of each of the two preceding years*"—(that is, for a period altogether of two years and eight months), and *should also*,—"during the time of such occupation," have been an inhabitant householder in Dublin, or within seven statute miles thereof; and should also have been rated, "*in respect of such premises so occupied by him*," to all rates made for the relief of the poor of the electoral division or union where such premises are situate, "*during the time of his occupation, as aforesaid*;" and should also have paid, before said 31st August, all such rates as therein specified.

Cause was shown against this conditional order, by the respondents; and the case has been very fully argued before us. When it was originally opened, it appeared as if the rights of the several respondents to the franchise rested upon different grounds, and would have raised different questions of law for our adjudication. Appellants' Counsel relied, in the first instance, on the statements in the affidavits, as showing that, having regard to the nature and condition of the several premises occupied by some of the respondents, and to the character of their occupation, they had not, within the meaning of the Act, occupied, for the requisite period, "*a house, warehouse, counting-house, or shop*." But in the progress of the argument, and upon a fuller consideration of the facts disclosed by the affidavits, and of the authorities cited by Mr. *Devitt*, particularly that of *Henrette v. Booth (a)*, it appeared to us that the premises occupied by each of the respondents did answer one or other of the descriptions in the Act, of "*house, warehouse, counting-house, or shop*;" and that his occupation of them was, of the

character required by the Act. In that case of *Henrette v. Booth*, in which the previous authorities were fully considered, it was decided, under the English Municipal Act, that a person occupying only a *part of a house* may be considered as the occupier of "a house," within the meaning of the Act, and acquire a right to the franchise from the occupation of such part, provided there be independent occupation of that part, and complete severance between it and the remainder of the house. And we are of opinion that, in each of the cases before us, where the premises occupied by the claimant were "part of a house," there appears, upon the facts disclosed by the affidavits, to have been such an independent occupation and severance of that part as to bring the case within the principle of the above decision. It is unnecessary to refer in detail to the various statements in the affidavits which bear upon this question; because this ground of objection was very fairly abandoned by Mr. *Chatterton*, in his reply.

The other ground of objection relied on is however common to the cases of all the respondents. It appears that, in each case, the premises for which each respondent had been originally rated consisted, not merely of the "house, warehouse, counting-house, or shop," which has been since and is now in his occupation, and in respect of which he claims the franchise, but also of the premises with the possession of which he parted subsequent to the rating, and previous to the 31st of August last; and appellant's Counsel insist that, by having done so, each respondent has lost his right to the franchise. They contend that, in order to entitle a person to the burgess franchise, under the Dublin Municipal Act of 1849, it is requisite that, during the entire of said period of two years and eight months, he should have occupied, not merely the "house, warehouse, counting-house, or shop" in respect of which he claims the franchise, but also all the other premises (if any) for which he had been rated jointly with such "house, warehouse, counting-house, or shop." The question here is not whether the claimant's occupation and rating should be co-extensive as to time. There can be no doubt on that point, as the Dublin Municipal Act expressly provides that the claimant should have been rated to all rates made during

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the period of his occupation—namely, said period of two years and eight months; but appellant's Counsel insist that such occupation and rating should also be co-extensive as to the extent of the premises themselves, and that the claimant should have occupied, during said period, the entire of the premises for which he had been rated; and they accordingly contend that, although in the cases now before us each respondent would be entitled to the franchise if he had been rated separately for the “house, warehouse, counting-house, or shop” of which he has retained possession, yet that, inasmuch as he was not so rated, but was rated jointly for those premises, and for others with the possession of which he has since parted, he has, by so doing, lost his right to the franchise, because he has not been, during the requisite period of time, in possession of the entire of the premises for which he had been rated.

A similar question has arisen under the General Municipal Act of 1840 (3 & 4 Vic., c. 108), and it has been decided that, in cases under that Act, the claimant loses his right to the municipal franchise by parting with the occupation of a portion of the premises for which he had been rated. [See, amongst others, the cases of *The Queen v. The Mayor of Belfast* (a), and *Wauchob v. Reynolds* (b)]. But the provisions of the General Municipal Act of 1840, on which those decisions were grounded, are essentially different from those of the Dublin Municipal Act of 1849; and it will accordingly be found, upon consideration, that these authorities do not govern or affect the cases now before us, which are under the latter Act. The 30th section of the General Municipal Act of 1840 specifies the qualifications which are thereby required for entitling a party to be placed on the burgess-roll of any borough. Under the provisions of that section it is necessary, not merely that the party claiming the franchise in any year should have occupied a “house, warehouse, counting-house, or shop” for the time therein mentioned, but it is expressly provided that such house, warehouse, counting-house, or shop should, “either separately or jointly with any land within “such borough, occupied therewith by him as tenant or owner, be “of the yearly value of not less than £10; to be ascertained and

(a) 8 Ir. Jur., N. S., 27.

(b) 1 Ir. Com. Law Rep. 142.

“determined *in manner following, and not otherwise.*” The statute then provides that such value should be a sum composed of the net annual value at which the premises so occupied by the claimant should be rated to the relief of the poor (as they are by the Act required to be), and of the sums at which the landlord’s repairs and insurances should be estimated in the poor-rate; and, further, that no such occupier should be enrolled as a burgess except he should have been rated for such premises to the relief of the poor, and should have occupied such premises (or others of the like nature within said borough) for the space of twelve months next preceding the 31st of August in that year. This statute therefore made it an essential part of the claimant’s qualification that the premises occupied by him during the entire of said twelve months should be of a certain annual value; and the statute also made the poor-law rate the only test by which the value of those premises could be ascertained, requiring that they should be rated at not less than a certain sum. But in case the claimant, subsequent to the rating, should have parted with the possession of a portion of the premises for which he had been rated, then that test would be no longer applicable; and, as the rating was at one sum for the entire of the premises, then (however small may be the portion with which he has parted) there would be no means of ascertaining, from the poor-rate, whether the annual value of the portion which he retained in his occupation was of the amount required by the statute. It is clear therefore, from these provisions of the Act of 1840 (and they import almost in terms) that the claimant should, during the entire of the twelve months, be in occupation of the entire of the premises for which he had been rated; and that, if he has parted with the possession of any portion, he cannot substantiate his claim to the franchise for that year, but should adopt the necessary measures to procure a separate rating for the other portion of which he retained possession.

This reasoning does not however apply to a claim for the municipal franchise under the Dublin Act of 1849, as in the cases now before us. That statute expressly repeals (so far as regards the borough of Dublin) the provisions of said former Act of 1840, as

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to the qualifications of burgesses, and substitutes for them the other provisions I have above mentioned; but it contains no provision requiring that the premises occupied by the claimant, and in respect of which he claims the franchise, should be of any particular value. It requires that the claimant should have occupied "a house, warehouse, counting-house, or shop" for said period of two years and eight months before the 31st of August (instead of the period of only twelve months, mentioned in said Act of 1840), and it also requires that the claimant should have been rated in respect of such premises to all rates made for the relief of the poor during said period of two years and eight months (with a provision that the premises in respect of the occupation of which the claimant should have been so rated, need not be the same premises, but may be different premises); but the statute is silent as to the value of such premises, and contains no reference whatever to it. It follows therefore that the reason for adopting the rule above stated, as to the effect of parting with the possession of a portion of the rated premises, where the franchise is claimed under the General Municipal Act of 1840, does not apply to cases under the Dublin Municipal Act of 1849. If, as in one of the cases now before us, the claimant was, during the requisite period, rated for "*a house*" and stable, and was in occupation of the "*house*" during the whole of that period, but parted with the possession of the *stable*, how can this circumstance take away or affect his right to the franchise under the provisions of the Dublin Act? He claims the franchise in respect of his occupation of the *house*, and not of the *stable*; he has occupied the *house* for the requisite period; he has been also rated in respect of said *house and stable* to all rates made for the relief of the poor during said period; and it cannot be reasonably contended that he was not rated for the house, as required by the Act, because he was rated, not for the house *separately*, but for the house *jointly* with the stable. If indeed the Act of 1849 required that the house should be of a certain value, to be ascertained by reference to the poor-law rating, then the reason for the rule adopted in cases under the General Municipal Act of 1840 would apply; but, as the Act of 1849 contains no reference whatever as

to value, and as it is not requisite, for any of the purposes of that Act, that the claimant should have been rated *separately* for the premises in respect of which he claims the franchise, I can see nothing in the Act that would warrant, either expressly or by implication, the construction which the appellant's Counsel seek to put upon it. The terms of the Act do not bear that construction; and Counsel have not shown that it is required for the purpose of carrying out the policy of the Act. We do not rest our decision in these cases upon the argument (often urged to an undue extent) that, if the question of the claimant's right be doubtful, we should decide in favor of the franchise. I admit that, if it appeared from the Act, either by express enactment or necessary implication, that the Legislature intended to exclude from the franchise those persons who had parted with the possession of a portion of the premises for which they had been rated, then that we should carry out that intention, and decide against the claim. But, in the present case (as I have already shown), the claimants possess the qualifications which, according to the express terms and literal construction of the third section, are requisite for the franchise; it is therefore incumbent on appellant's Counsel to show something in the subsequent provisions, or in the policy of the Act, repugnant to that construction: and this they have altogether failed to do. The argument they have urged, on the ground that "occasional residences" are against the policy of the Act, does not apply at all to the cases before us; where the objection is, not that the claimants have not occupied for the requisite period the "house, warehouse, counting-house, or shop" in respect of which they claim the franchise, but that they have not occupied for that period other premises, the occupation of which (as it is admitted by appellant's Counsel) would not have been at all requisite if the claimants had not been rated for such other premises jointly with said "house, warehouse, counting-house, or shop." In fact, although, under the statute of 1849, the value of the occupied premises is no longer a test of the claimant's qualifications, and although he does not lose his right to the franchise by the mere fact of parting with the possession of a portion of the premises for which he was rated, provided the portion

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which he retains in his occupation includes the "house, warehouse, counting-house, or shop," yet that statute provides more effectually against occasional residences than the previous Act of 1840; inasmuch as it substitutes two years and eight months, instead of twelve months, as the period during which the claimant must have resided within the borough, or seven miles thereof, and must have occupied "a house, warehouse, counting-house, or shop" within the borough.

We are accordingly of opinion that the claimants' names should be retained on the burgess-roll, and that the cause shown by them against the conditional order should be allowed; but, under the circumstances, without costs. It appears that this is the first occasion on which the question before us, under the Act of 1849, has been raised for the adjudication of this Court; and that the appeal was taken at the suggestion of the Court below, in order to obtain our decision for their future guidance.

HAYES, J.

I concur in the opinion that these four names should be retained on the burgess-roll. The great point, upon which Mr. *Chatterton* relied as being almost decisive of the whole question, was, that the rating should, in its local limits, be exactly conterminous with the occupation, in order to entitle the occupant to the franchise. He took a distinction between the burgess franchise and the Parliamentary franchise; and, acting upon that, he thought that the case of *Wright v. The Town-clerk of Stockport* (a) did not apply to the present case. I do not concur in his view. Although it was a case of the freeman franchise, the reasons there given really govern this case. To entitle a burgess to the franchise, there must be not only an occupation, but a rating of the premises occupied. In both cases it becomes a matter of inquiry whether the individual must be separately rated for those premises, apart and distinctly from all other premises. In *Wright v. The Town-clerk of Stockport*, it was held that a person is not the less rated for certain premises because he is rated for others with them. Whether the object of the Legislature,

(a) 5 M. & Gr. 33.

in requiring the rating, was, that it should be additional evidence of occupation, or additional evidence of the *status* and condition of the party in society, and that he is bearing his share of the public burdens, there is nothing in the letter or in the spirit of the statute to introduce the distinction taken by Mr. *Chatterton*. We are not warranted in introducing words which are not in the statute, and which are against the meaning of the Legislature. That point disposes of the two first cases; and goes a long way to dispose of the other two, upon which I have only to say a word in addition.

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In *Mellon's case*, the party held a shop and parlour. The shop was closed from the inside; and at night the party went out through a door from the shop into the hall, and so into the street through the front door of the house. There was something of the same kind in *Fitzgerald's case*. He held a shop and parlour, and the shop had a door communicating with the hall, leading to the door of the owner of the house. Though Fitzgerald might have gone out by that way, he had a separate door for himself. It appears to me that, in each of these cases, the claimant's right to pass into the hall of the master of the house, and from thence through his hall-door into the street, is nothing more than a privilege or easement to which the master of the house is subject; but does not derogate from his rights as owner of the mansion.

FITZGERALD, J.

I concur in the result at which the other Members of the Court have arrived; but propose to offer an opinion only upon the plain single question to which the clear, ingenious, and candid argument of Mr. *Chatterton* reduced the case.

The case is of great practical importance. The subject-matter of occupation, in all the cases, it was conceded, was a tenement which, if separately rated, was sufficient to confer the franchise; the rating being of sufficient duration in point of time. It seems to me that the occupier of the tenement is not less duly rated to the relief of the poor because it includes, or is rated with some other tenement, or forms part of some other tenement held along with those duly rated to the relief of the poor.

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A landlord sued his tenant for (first) an injury done by the tenant to the landlord's reversion, by (*inter alia*) wrongfully removing from the land large quantities of clay; and for (secondly) a conversion of the same clay.

The jury found that the removal of the clay had depreciated the value of the land by £156; and that the value of the clay itself was £150. A verdict was entered for the former sum.

Held, on motion to increase the verdict, by adding thereto the sum of £150, that the plaintiff was not entitled to receive the value of the clay, as well as compensation for the injury done him by the removal of the clay.—

[LEFROY, C. J., *dissentiente*.]

SUMMONS AND PLAINT:—First paragraph—That at the time, &c., certain land, situate at Ballymacarrett, in the county of Down, was in the possession of the defendant, as tenant thereof to the plaintiff, the reversion then belonging to the plaintiff, and the defendant injured the plaintiff's said reversion in said land, by wrongfully opening certain cuts, holes and excavations in said land, committing waste therein, and wrongfully digging and wrongfully removing therefrom large quantities of clay and soil—to wit, 10,000 cubic yards thereof, of great value, to wit, of the value of £600, which the defendant wrongfully carried away and converted to his own use, to the damage of the plaintiff of £600.

Second paragraph—Trover for the conversion, by the defendant to his own use, of the plaintiff's goods—to wit, 10,000 cubic yards of clay and soil.

Plea (to both paragraphs, and to the whole of the plaintiff's claim):—Payment into Court of the sum of £60, in satisfaction of the plaintiff's claim; whereupon issue was joined.

The case was tried at the last Spring Assizes for the county of Antrim, before HAYES, J. The evidence was very voluminous, but it is not material to be stated at length. For the plaintiff it was proved that the defendant had dug up and carried away a large quantity of the soil, which was a species of brick-clay; and the alleged injury to the reversion consisted in the removal of a rise or knoll, which had given to the land a peculiar value as a site for villas, the ground being situated in the neighbourhood of Belfast.

The defendant's evidence was wholly directed to reduce the amount of damage. Evidence was given by him to the effect that the land had been improved, for agricultural purposes, by

the removal of the brick-clay, the land being drained, subsoiled and deepened; and also to prove that the quantity and value of the clay removed had been less than had been alleged by the plaintiff.

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The defendant's Counsel insisted that the plaintiff was not entitled to compensation both for the depreciation in value of the land as a site for villas, and also for the value of the clay as brick earth.

The learned Judge called upon the plaintiff's Counsel to say whether they insisted on compensation in damages both for the value of the clay removed, and also for the depreciation of the field as villa ground.

The plaintiff's Counsel replied in the affirmative.

The learned Judge, when charging the jury, left it to them to consider the amount of damage sustained by the plaintiff, in three aspects, as it had been presented in the evidence for the plaintiff:—First, upon a consideration of the value of the clay and soil which had been removed; secondly, considering the ground as depreciated for agricultural purposes; thirdly, considering it as ground adapted for setting as villa ground in the neighbourhood of Belfast.

The learned Judge, being of opinion that the plaintiff was not entitled to have the value of the clay removed added to the amount of depreciation, requested the jury to give him separate answers to those questions; and reserved for the Court above the question whether he had left the case to them correctly. He also told the jury that the plaintiff was entitled to the result in such view as was most favorable to himself. No objection was made to the way in which the questions were left to the jury.

In answer to the first question, the jury estimated the clay taken as 9000 cubic yards, at 4d. per yard; making £150.

In answer to the second question, the jury found that, for agricultural purposes, the land had not been deteriorated at all.

Their answer to the third question was, that the freehold had been deteriorated, for building purposes, to the amount of £13 per annum; which, at twelve years' purchase, amounted to £156.

Thereupon the learned Judge directed the jury to find a verdict

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 Court; and reserved to the plaintiff leave to move the Court above
 to increase the verdict by the sum of £150, the value of the clay.
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A conditional order having been obtained, pursuant to the leave reserved—

R. W. M'Donnell (with *Hugh Law*), showed cause.

The only question in controversy upon this motion is, whether the plaintiff is entitled to add together, and include in his verdict, the two sums—the value of the clay removed, in its character of brick-clay, *and* the amount by which the land has been deteriorated for building purposes. The plaintiff is, no doubt, entitled to get the best value which he himself could have extracted from the land, had he been in possession of it; but he is not entitled to get both these sums, which respectively represent the amount of the deterioration done to the land, in its capacity to be used for two purposes, which are utterly inconsistent the one with the other, and for one only of which the land could have been used at one time. Neither the plaintiff nor any other person could have used the surface of the land, at one and the same time, as a site for villas *and* as clay for making bricks of. Had the plaintiff used the land as a site for villas, it would have been absolutely worthless to him in its character of brick-clay. Neither could he have made bricks from the soil without doing to the land the very injury of which he now complains. The injury to the land, as a site for villas, consists in the removal of an undulation from the middle of the field; and this must be removed in using the ground as a brick-field. A sum equivalent to the value which the plaintiff could have realised, if he himself had been in occupation, is the proper damage: *Jones v. Gooday* (a). The *onus* of proving that the land could be used for more purposes than one at the same moment lay on the plaintiff, who must now fail, because he did not prove that both values could be extracted from the land at one time. Perhaps it may be argued that, although this sum of £156 was, *prima facie*, given as compensation for the whole injury suffered by the plaintiff, yet in fact it is not full compensation for that injury, because the jury excluded

(a) 8 Mee. & W. 146.

the consideration of any additional benefit to be derived by the plaintiff from using the land, at some future time, for some purpose other than as a site for villas. But the jury meant to include in that sum every injury, whether direct or merely incidental and collateral, that could have accrued to the land, considered as building ground. No doubt, it is a maxim of law, "*Omnia præsumuntur contra spoliatorem*;" but that maxim only applies to cases in which there is, peculiarly within the knowledge of the defendant, some fact which he concealed. In that case, the jury must give the highest possible value to the article, as against that party: *Armory v. Delamirie* (a). But where there is no fraud on the part of the defendant, the presumption is against the plaintiff: *Clunnes v. Pezzey* (b).

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The maxim "*Omnia præsumuntur contra spoliatorem*" does apply here, because the witnesses proved that the abstraction of the soil had been going on for some years without the knowledge of the plaintiff; and, if both the sums claimed by the plaintiff are not given him, the defendant will repay the costs and damages recovered on the first count by the profit of making the clay into bricks, and selling them, although that clay became a chattel the instant it was severed from the land; and, as such chattel, was undoubtedly the property of the landlord, the plaintiff. The plaint contains two paragraphs, framed upon two distinct rights of action, in respect of each of which the plaintiff is entitled to recover damages. The landlord's right to recover the value of the chattel, under the paragraph in trover, cannot be questioned. Then he has also a right to recover damages for the distinct injury done to the reversion, these damages being claimed in a distinct paragraph. The land was injured, not only by the actual removal of the clay, but also by the *manner in which* the clay was removed. Had the present defendant been a trespasser, instead of being a tenant, the actual tenant would have been injured by the removal of the soil; and the landlord would have sustained another injury in respect of

(a) 1 Str. 504; S. C., 1 Sm. Lead. Cas. 301.
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(b) 1 Camp. Rep. 8.
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his reversion in the land, as building ground. When a tenant cuts down ornamental timber, the landlord is entitled not only to the value of the timber as a chattel, but likewise to compensation for the indirect injury done to him by the tenant's wrongful act, quite irrespective of the selling value of the timber.—[O'BRIEN, J. If the landlord, in that case, received £20, as the value of the timber when cut, and its value as ornamental timber standing on the estate was £500, surely he would not be entitled to get £520? Should not the jury subtract the former from the latter sum; and give him, either £500 for *both* injuries, or £480 for one of them and £20 for the other, if they awarded damages on separate counts?]

—But in the present case the defendant committed a further injury, by altering the levels, and by removing the clay in such a manner that it was impossible to ascertain accurately the extent to which the landlord had been injured. The plaintiff is entitled to both sums, as he might have used part of the land as a site for villas and part as brick-clay. The landlord has been further injured by being deprived of his option at what time he would use the land in one capacity and at what time he would use it in the other. That option was capable of being measured in moneys numbered, as the value of the brick-clay would have increased after a little time, when villas were being built in the neighbourhood. In *Morgan v. Powell* (a) the plaintiff was held entitled to damages, as well for all injury done to the soil by digging, and for the trespass committed in dragging the coal along the plaintiff's adit, as also for the value of the coal itself when severed. The jury have separated the value of the ground from the value of the clay, as such, and the sum of £156 does not include the value of the clay as a chattel. The two paragraphs are entirely distinct.—[FITZGERALD, J. Could not the plaintiff have given all the evidence, both as to the present value of the clay and as to the depreciation in value of the land, under the first count?]

—The defendant, having paid money into Court, on *both* counts, cannot raise that objection, even if it were well founded. But it was necessary to insert in the plaint a separate count in trover, which is the proper form of action in which to sue for the chattel value of

(a) 3 Q. B. 278.

the clay: *Higgon v. Mortimer* (a). In an action of trespass, damages for both injuries might have been recovered. If a tenant cuts down a tree, which is excepted from the lease, the landlord could recover, under one count, both for the trespass in cutting down the tree and also for the value of the timber. But evidence as to the value of the clay could not have been given under the first count in this plaint, which is simply a count for an injury to the reversion. The form is given in *B. & L. Precedents*, p. 229. Separate damages must be given for the trespass and for the injury to the land by the digging: *Mayne on Dam.*, p. 239.

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The first count includes the second count, and something else besides. No complaint is made in it of injury done to the land by the *mode* of removing the clay; nor was there any evidence to support that view. No proof was given that the clay was *unskillfully* removed, but simply that the unavoidable consequence of its severance and removal injured the land. The plaintiff says that, if the jury find that the deterioration of the property amounts to so much, and the value of the clay amounts to so much, when estimated separately, these two sums, when added together, represent the amount of his loss. But the value of the clay is, of necessity, part and included in the amount of the deterioration; so that the plaintiff would get double damages, the value of the clay twice over, if both sums were given him. The plaintiff himself, if in possession of the land, could not have enjoyed it in its undeteriorated condition, and also at the same time have got the price of the clay as a chattel.

Cur. ad vult.

On a subsequent day, the Court desired that the case should be re-argued by junior Counsel on each side, principally with reference to the question whether it was open, on the pleadings as they stood, to the plaintiff to go for two distinct species of damage. Accordingly, on the last day of Term—

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Harrison, for the plaintiff, contended that the plaintiff had a right to obtain damages under both counts. The first count is for conversion of the clay, with an injury to the reversion; and, after verdict, and evidence unobjected to at the trial, the count sufficiently expresses on its face a cause of action, which enables the plaintiff to recover, both for the value of the clay and for the injury to the reversion, unless he has recovered *pro tanto* under the count in trover. It has been contended that the plaintiff has no right to get both sums, because he himself could not have obtained both values from the land. A tenant has no right to argue thus against his landlord; for he admits that he has done two wrongs, but recoups himself out of the profit derived from one of these acts for the damages recovered against him in respect of the other. Although the first count is framed under the new system of pleading, it is in substance the same as the precedents in 8 *Wentworth on Plead.*, p. 587, and 2 *Ch. Pl.* (5th ed.), p. 784, at the end of each of which is a direction to add a count in trover, showing that the plaintiff could not have recovered, under the counts for injury to the reversion, the present value of the goods carried away.—[FITZGERALD, J. For a moment, lay aside all consideration of the second count. Then the true foundation of the first count is, that the plaintiff is entitled to recover on it such an amount as will place him in the same position as if the wrongful act had not been done. But there is no evidence that the plaintiff could ever have used this land for building purposes and also for brick-clay.]—The wrongdoer has no right to use that argument.—[FITZGERALD, J. He has no right to use it in justification of his conduct, but he may use it to reduce the damages.—LEFROY, C. J. The two things are quite separate, and could be enjoyed separately. Had not the landlord a right to get back his land in a condition which would enable him to use the land now in whatever way he pleased, and to defer using it as brick-clay until the time came when it would be more valuable?—Yes; and it was open too for the plaintiff to show that the clay could have been removed without injuring the surface.—[FITZGERALD, J. That objection might be a ground for a new trial motion; but not for the present motion, which is merely to

increase the damages.]—At all events, without the count in trover, the present value of the clay could not have been recovered: *Higgon Mortimer* (a); *Cotterill v. Hobby* (b).—[FITZGERALD, J. I do not see how the case can be properly determined without a new trial; for the question was left to the jury wrongly. They should have been directed to include the present value of the clay in the finding on the first count.]—The request for a new trial should come from the defendant. The plaintiff gave no evidence as to the reversionary value of the clay.

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The defendant did not object to the evidence given, because he admitted that the plaintiff was entitled to get the best value which he himself, if in possession, could have extracted from the land; and was therefore entitled to lay before the jury all evidence necessary to enable them to determine which value was the highest. But the plaintiff is not entitled to recover all three values, unless he proves that he could have used the lands for all three purposes simultaneously. The jury have included the present value of the clay in their estimate of the loss of the prospective value of the land. Had they found what would have been the value of the clay after the ground had become useless as a site for villas, those two sums should have been added together. But there has not been any separate assessment of the reversionary value of the clay. It has been said that the defendant, the tenant, is not at liberty, after committing the wrongful act, to argue that the landlord could not have used the land simultaneously for more than one purpose; but it lay on the plaintiff to prove affirmatively that the land could have been so used. Without such proof, he cannot recover: *Mercer v. Whall* (c). The first count is in trespass, with an *asportavit* to increase the damages. In such a case as this, a count in trover is inconsistent with the first count. They cannot subsist together, because the future value of the clay must be included in its present value: *Lechmore v. Toplady* (d). If counts in trover

(a) 6 C. & P. 616.

(b) 4 B. & Cr. 465.

(c) 5 Q. B. 447, 465.

(d) 1 Show. 140.

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and trespass are not absolutely inconsistent with each other, at least trespass includes trover: *Higgon v. Mortimer* (a). There, Parke, B., said that the removal by the tenant, during the tenancy, of virgin soil, enables the landlord to "maintain trespass *de bonis asportatis*, and *a fortiori* trover;" meaning, that he can recover something in trover, but more in trespass. So, here, the plaintiff, who has recovered on the first count, has got the value of the land as building ground, together with a part of what he could have recovered under the second—namely, the present value of the clay. Therefore to add these sums together would be to give the plaintiff double damages *quoad* the clay.

Cur. ad. vult.

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FITZGERALD, J.

This case of *Templemore v. Moore* comes before the Court upon a conditional order obtained by Mr. Joy, on behalf of the plaintiff, simply to increase the amount of the verdict had for the plaintiff below for £156, by adding to it another sum of £150, under the circumstances which I shall now state. By the writ of summons and plaint, Lord Templemore stated that, being himself the owner in fee of certain lands of which the defendant was tenant from year to year, and being the owner of the reversion, subject to that yearly tenancy, the defendant injured the plaintiff's reversion in such land by wrongfully opening certain cuts, holes and excavations in said land, committing waste therein; and wrongfully digging and wrongfully removing therefrom certain large quantities of clay and soil, to wit, 10,000 cubic yards thereof, of great value, to wit, £600, which the defendant wrongfully carried away and converted to his own use. The second paragraph was in trover for the conversion by the defendant to his own use of 10,000 cubic yards of clay and soil; and £600 was claimed as the amount of damages, upon each paragraph. The first paragraph therefore complained of an injury to the plaintiff's reversion, by digging up, and removing and carrying away certain clay; and the other is simply a paragraph in trover for the value of the clay.

(a) 5 C. & P. 616.

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The case was tried at the last Antrim Assizes, before my Brother HAYES; and the plaintiff's Counsel, in opening the case of damage to the land, presented it to the jury in three aspects—first; that the plaintiff was entitled to damages, because the defendant, being his tenant, had wrongfully excavated and removed the clay, which was a description of brick-clay; and the plaintiff alleged that, by that wrongful removal, the clay had become a chattel, and that he was therefore entitled to get the value of it. Next, he said that, by the removal of the clay, the land had been injured in an agricultural point of view by the removal of the soil; and, thirdly, the plaintiff alleged that the land, being situated in the immediate vicinity of Belfast, and capable of being used as a site for villas, had been injured by the same act, in that its highest character, and as producing the largest rent, for building purposes.

The evidence was very voluminous; and I shall only refer to it to this extent—that the act complained of may in substance be described as the lowering of the surface of the field in question, by removing a knoll or piece of raised ground, which affected both its beauty and character for building purposes; and that this knoll, which was undoubtedly wrongfully removed and cut away, was composed of brick-clay, which the defendant had used for the manufacture of bricks. That was the plaintiff's case shortly; but the evidence as to the extent of the injury was very voluminous. "During the address of the defendant's Counsel to the jury"—I now state from the report of the trial with which the learned Judge has favoured us—"I called on Mr. Joy, for the plaintiff, to tell me "did he insist on compensation in damages for the value of the clay "that was removed, and also for the depreciation of the field as villa "ground? He replied in the affirmative."

The evidence given by the defendant was directed to reduce the extent of the injury; and when the case had closed, the learned Judge left it to the jury "to consider the amount of damage sustained by the plaintiff, in the three aspects in which the case had "been presented to the jury in the evidence for the plaintiff—first; "upon a consideration of the value of the clay and soil that had "been removed;" and I may remark in passing that there could be

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no controversy but that the clay, once it had been removed from the subject-matter of the tenancy held by the tenant, became a chattel, in respect of which the landlord (the plaintiff) had a right to maintain an action; and, accordingly, the learned Judge told the jury what I have stated. The learned Judge, secondly, left the question to the jury—"considering the ground as depreciated for agricultural purposes; thirdly, considering it as ground adapted for setting as "villa ground in the neighbourhood of Belfast." The learned Judge further reports that he required the jury to give him their answers to these questions separately, as in his opinion the plaintiff was not entitled to have the value of the clay removed added to the amount of depreciation; and he reserved for the Court above the question whether he was correct in what he had so done. The learned Judge also told the jury that the plaintiff was entitled to the result in such view as was most favorable to himself.

The jury, accordingly, gave separate answers to those questions. They found for the plaintiff, and estimated "the clay taken as 9000 cubic yards, at four pence per yard, making £150." They found "that the freehold has been deteriorated for building purposes £13 per annum." The tenancy was only from year to year; and of course the reversion could by a notice to quit have been reduced into possession at any time. Accordingly, the jury treated it, not as an injury to the reversion, but as an injury to the present value of the land. They said that, estimating the value of the land for building purposes, "the freehold has been deteriorated £13 per annum, which, at twelve years' purchase, makes £156." They took £13 per annum for twelve years as the fee-simple value of the increased rent which the land would have produced if let for building purposes prior to the deterioration. Of course, if the fee-simple of the ground had been estimated for agricultural purposes, a larger sum would have been given. But the evidence on that question was conflicting; the evidence for the defendant being to the effect that he had improved the land for agricultural purposes, by taking away soil which was useless, and by improving the drainage; and the jury found that the deterioration, in an agricultural point of view, was nothing. The learned Judge further reports "that the plaintiff's

"Counsel made no objection to the way in which those questions were left to the jury; and that it appeared to be with the assent of both parties that he directed the jury to find for the plaintiff £96 damages, over and above the £60 paid into Court, reserving to the plaintiff leave to move the Court to increase the verdict by the sum of £150, the value of the clay."

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In pursuance of that reservation, the plaintiff obtained this conditional order, which complains of no misdirection save this, that the learned Judge declined to direct the jury, as a matter of law, that the plaintiff was entitled to have both sums added together. By the conditional order, no other misdirection is complained of; it does not ask the Court to send the case to a new trial, but simply asks this Court to do, in point of law, what it is alleged that the learned Judge below should have done, by adding the two sums together. I have asked what was the form of the *postea*, in order to see how the verdict was entered; and I have it now before me. The finding is entered on the two counts: it is that the sum lodged in Court is not sufficient to satisfy the plaintiff's claim; and that the plaintiff is entitled to recover the sum of £96, over and above the sum lodged in Court; in other words, the plaintiff has got the larger of the two sums so found by the jury on the two counts.

On the 5th of May 1862, cause was shown against this conditional order; and afterwards, some Members of the Court feeling some difficulty, both as to the construction of the pleadings and on the main question, the case was re-argued, on the 13th of May 1862, by one Counsel on each side. At the trial, the plaintiff contended that he was entitled, as matter of law, to a direction to the jury to add the value of the depreciation to the value of the clay; and, as matter of law and right, to have the verdict entered for him for both those sums; and now contends that he is entitled, in point of law, to have the verdict entered for him for compensation for his loss to the amount of both the sums.

During the argument, a Member of the Court asked, more than once, whether any evidence was given below, or any case made, that the plaintiff could have cut and removed the clay, whatever its character, so as to make it valuable as clay, or to be manufactured into

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bricks, without doing the same injury to the ground as villa ground, of which he now complains, and for which the jury had given him the £156? The answer was, that no such evidence was given, nor had such a case been made. But it was suggested that was not the true test, and that the plaintiff was entitled to have the clay remain there on the land; and that if at some indefinite time, say 500 years hence, he was not using the land as building land, he would then have had his clay there still. It now appears that no such evidence was given; and it is obvious that the plaintiff could not have got that clay himself in any way without accomplishing the very injury of which he has complained in the first count.

On the re-argument, some Members of the Court intimated to Counsel that probably a new trial would be necessary; and, accordingly, gave them time to consider that proposition. Neither party, however, seeks now for a new trial; and both require our decision on the case as it stands, and on the question of law raised by the conditional order.

In my opinion, on the question so raised by the conditional order, the plaintiff is not entitled, as matter of law, to have these two sums added together; that is to say, he is not entitled to have added to the value of the clay the full value of the injury done to the ground as building ground, and to have a verdict entered for him for both those sums. The true rule applicable to such a case is that acted on by Coleridge, J., in the case of *Morgan v. Powell* (a). That rule, when applied to the present case, shows that the direction to the jury should have been that the plaintiff was entitled to recover compensation only for the damage which he has actually sustained, and that he has a right to ask us to place him in the same position as he would have been in if the clay had never been disturbed. But the plaintiff demands much more than that; for, as I understand the verdict, we must take it that the jury, in the sum of £156, gave full compensation for the injury done to the ground, as a site for villas, by the removal of the clay. The jury treated the case, in truth, as if the ground had not been altered, and as if the clay was still there; and said that, using

(a) 3 Q. B. 278 (note, p. 279).

that ground in that character, the plaintiff would have got £13 per annum more rent for it, and gave him the fee-simple value of it *as building ground*. The plaintiff, however, demands much more than that here. He has got a verdict for that sum; but he demands compensation both for the lowering of the surface and for the taking away of the soil, and for the value of the clay itself. If we yielded now to the present motion, the result might be to compensate him to some extent twice for the same injury; that is, as far as pecuniary damages can do so, to restore him to the position in which he was before the injury was done, and then give him another sum for the same injury, which sum he himself never could have got without injuring the land itself in the way in which it has been injured by the wrongful act of the defendant.

If we were now asked to determine the precise course that should have been followed at the trial, and if, instead of calling upon us as matter of law to increase the verdict, by adding the two sums together, the motion was one complaining that there had been a misdirection at the trial—that the question of damages had not been properly left to the jury; and if we were now asked to consider the precise course which should have been taken at the trial, the question would be wholly different from that which is now before us; and I, for one, would be inclined to say that the course which should have been adopted at the trial was this—the plaintiff should have been required at the close to elect between the two counts, and say upon which count he would proceed; because, though a plaintiff may shape his cause of action in different forms, he is not entitled to get damages upon each of several counts, all of which state the same injury in different ways. Now, in the first count the plaintiff complains of an injury done to his reversion. By what? By wrongfully excavating and removing and carrying away the soil. By the second count he asks damages for the removal and carrying away of the same soil; and, if in respect to that clay, he was entitled to damages on both counts, it is obvious that for one and the same thing he would be getting double damages. If he had elected to proceed on the second count,

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he would have been entitled to the value of the clay. If, on the other hand, the plaintiff had rested on the first count, then the Judge should have left to the jury, on that count, the removal and the value of the clay, as matters proper for their consideration in estimating damages; and should also have told them to take into account the injury done to the reversion. But they should have been warned that, in estimating the amount of that injury to the reversion, they were to take into account and ought to consider how far, the value of the clay removed, which the plaintiff could not have got except by committing the same injury, would be a compensation to him for that injury. I can suppose a case in which, if the conduct of the defendant had been malicious, the jury might have given the full value of the two things. Applying the rule stated by Coleridge, J., in *Morgan v. Edwards*, the jury should have been told that the plaintiff was entitled only to compensation for the damage actually sustained by him, and only to such compensation as would put him in the same position, as far as practicable, as he would have been in if the clay had not been removed. It is impossible to say that you do not do more, in first giving the plaintiff the full compensation for the injury done him by the removal of the clay; and, secondly, giving him full value for the clay itself. Upon these grounds, it appears to me that the plaintiff was entitled to compensation only for the actual injury sustained by him, and is not entitled, as matter of law, to have both sums added together, the effect of which might have been to give him double damages for the same cause of action. Again, I have to observe that no special direction was asked for by the plaintiff below; and now again he has refused to apply for a new trial, and asks us, as a matter of law, to say that the learned Judge ought to have directed the jury to add the £150 to the £156. In my opinion, he is not entitled to that direction, as a matter of law; and, though it is likely that we would have been inclined to give him a new trial, if he had asked for it, yet, as he has declined so to do, it only remains for me to say that I think we ought to allow the cause shown against the conditional order.

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In this case, I am of opinion that the amount of the verdict should not be increased, and that the conditional order obtained for that purpose by the plaintiff should be discharged. The facts of the case have been so fully stated, that it is unnecessary for me to refer to them further than may be necessary to explain the grounds of my decision.

The first count of the summons and plaint is for the injury done to plaintiff's reversion in the land by defendant's excavations; and, if plaintiff's claim rested on that count alone, he would (according to the general established rule in such cases) be entitled to recover only such sum as would compensate him for the damage he sustained by the acts complained of, and as would put him in the same position as he would have been in if those acts had not been done. This principle was not disputed during the argument: it was laid down by Coleridge, J., in his directions to the jury, in the case mentioned in the *note* to *Morgan v. Powell(a)*, and was recognised and acted on in several other cases referred to in the argument. In the case now before us, the jury have found that the excavations complained of have deteriorated the value of the land as villa ground for building purposes, to the extent of £156; but have not at all deteriorated its value for agricultural purposes. They were of opinion, on the evidence, that such deterioration in the yearly value of the land for villa or building purposes amounted to £13 a-year, which sum, calculated at twelve years' purchase, made up the £156. It may be that twelve years' purchase was too low an estimate; but it is to be considered that such estimate was made, not with respect to the entire value of the land, but merely for the purpose of calculating the value of said yearly sum of £13, by which the yearly value of the land (if used for villa or building purposes) would have been depreciated by the excavations. Be that, however, as it may, the plaintiff cannot now impeach the sufficiency of such estimate and calculation, as neither the findings of the jury on the particular questions left to them by my Bro-

(a) 3 Q. B. 279 n.

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ther HAYES, nor the principles on which those findings were based, have been objected to. It follows therefore that this sum of £156 is to be considered as representing the entire amount by which plaintiff's reversion in the land has been deteriorated in value by reason of the excavations; and as the sum which (supposing there was no allowance or deduction to be made there-out) would be required to put plaintiff in the same condition, in regard to the value of such reversion, as he would have been in if the excavations had not been made. It appears, however, that the value and selling-price of the clay raised by such excavations amounted (as found by the jury) to the sum of £160. That clay when raised was unquestionably the property of the plaintiff. The second count of the summons and plaint was for trover of that clay; and on that count he was therefore clearly entitled to recover said sum of £150; but, if he recover that sum, can it then be held that he has lost the £156, by reason of the injury done to the land by the excavations, where, as one of the results of those excavations, he gets £150 for the clay which was raised thereby? It is true that the clay when raised belonged to him; but it would not have been raised, and he would not have got the £150 for it, if the land had not been excavated. In estimating therefore the damage which plaintiff has actually sustained from the injury done to the land by the excavation, I think it clear that the amount which plaintiff has realised by the clay should be deducted from, and set off against the amount of the deterioration in the value of the land. It cannot be contended that plaintiff has actually sustained damage by the excavations to the extent of £156, the full amount of such deterioration, if at the same time he has realised by such excavation the sum of £150 for the clay. That sum should be deducted from the £156, which would leave £6 as the actual damage sustained by plaintiff after getting the value of the clay. The issue for the jury to try was whether the sum to which plaintiff was entitled, in respect of the causes of action in both counts of the summons and plaint, exceeded, and by how much, the sum of £60 lodged in Court by defendant; and that issue should, in my opinion, be deter-

mined in the following manner:—The plaintiff was clearly entitled on the second count to recover £150, the value of the clay; and having got that sum on the second count, he was, according to the principle I have above stated, entitled to recover only said sum of £6 on the first count, those two sums making together £156; which exceeded said sum lodged in Court by £96, the amount which the jury found by their verdict. Plaintiff seeks by his conditional order to recover as well the full amount by which the land has been deteriorated in value, as also the amount in value of the clay. In my opinion, he is not entitled to do so, or to recover more than the sum found by the verdict.

It was suggested by plaintiff's Counsel, during the argument, that, if defendant had not excavated the land, the plaintiff himself might have done so after defendant's tenancy had determined—that he might have raised the same quantity of clay without deteriorating the value of the land as villa ground to the same extent as has been done, and might have afterwards set the land for building purposes, at a less depreciation in value than has been caused by defendant's excavations; and that in fact part of the present depreciation has been caused by the unskilful manner in which defendant's works were carried on—such as the unnecessary and improper removal of a knoll or mound upon the land, which was taken away to fill up holes made by the excavations in other parts of the land. In answer to this argument, it is sufficient to say that no such case was presented to the jury, or made by plaintiff at the trial—that no evidence was given to sustain it; and that, accordingly, we should not be warranted in increasing the verdict upon any such ground. If indeed evidence had been given to satisfy the jury that, by a different and better system of excavation, the clay could have been raised with less injury to the letting value of the land, then it might be contended that a different principle of calculation should have been adopted for estimating the amount of plaintiff's damages; but, in the absence of any such evidence at the trial, I think that the verdict found was for the proper sum. The case now suggested would at most be only ground for our granting plaintiff

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a new trial, in order that he might, if he could, give evidence to establish it; but his Counsel have stated that, if they cannot sustain their conditional order for increasing the verdict, they would not seek for a new trial; and it appears to me that they have decided rightly in not doing so. If the mode of excavation adopted by defendant was of the character now suggested, and if the clay might have been raised with less injury to the land, it is difficult to suppose that such fact would not have appeared upon the evidence of the civil engineers and other witnesses examined for plaintiff at trial, who had from time to time inspected and examined the works.

On these several grounds, I am of opinion that the verdict should stand for its present amount, and that the conditional order should be discharged.

LEFROY, C. J.

In this case, I regret to say that I feel myself bound to differ from my learned Brethren. It appears to me that the plaintiff is entitled to damages for the injury to the possession of the land, and for the injury to the reversion. In point of law, there is no doubt that the owner of land is entitled to compensation for an injury to the possession, by the tenant digging and taking away the soil. That is a substantive injury, for which the owner of the land is entitled to compensation. He is also equally entitled to compensation for an injury to his reversion; that is, to his estate in reversion, as an incorporeal hereditament, as distinguished from injury to the possession. The distinction is fully exemplified in this case; and when the same person by his act occasions both injuries, the principle of law applies, and he is answerable for both. Well now, what are the injuries here complained of, and the injuries proved? I will first take the injury complained of in respect to the possession, by digging large holes, and taking and carrying away the soil, and making it into bricks. The value of this clay is the first cause of action. If the holes had remained open, there could be no doubt, I apprehend, that would constitute a distinct injury—one, the digging and carrying

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away the soil—the other, making holes and leaving them open, if they were left open until the reversion accrued. But it is said that the defendant filled up the holes again, and that therefore that injury was put an end to. Admitting this to be so, and that the filling up the holes put an end to that injury—but how did it do so? By committing another and a greater injury, which is the second cause of complaint, by taking away the surface of the hill, which, it is admitted, gave to the land a peculiar value as a site for villas. And here is the second ground of complaint, and the one which peculiarly affects the reversion. Although this might be called a *fictio affectionis*, yet it does carry a value in moneys numbered; and, accordingly, evidence of this value was given: and the case was left to the jury to estimate damages for this species of injury. These are two distinct injuries which, if they had been done to several persons, or to several lands, would have carried several rights of action; and if both be done by the same person to the same land, there is no reason why he should not answer for both to the person against whose rights he has committed both. But with respect to these rights (though as to the rights themselves, it appears to me that at all events my Brother FITZGERALD does not differ from me), it seems to be considered that, if a certain course had been taken at the trial, the plaintiff might then have been entitled to recover compensation for both; but that he has, by the course which he took at the trial, deprived himself, as he has refused a new trial, of the advantage which he might otherwise have had by taking a different course at a second trial.

I am not sure that I have collected exactly this view of the case; but, so far as I see before me what was done at the trial, I can venture to deal with it. The great ground, in respect to what took place at the trial, upon which the plaintiff is supposed to have lost his rights, is this, that it would be giving him double damages, by the finding of a jury, for one and the same injury. Now I admit, if that appeared on the face of this record, it would be impossible to sustain this application. It is said however that the jury, in giving damages for the value of the land as a site upon

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which to build villas, have included the value of the clay ; and that therefore, in the assessment upon that head, they have erred. If they have so included the value of the clay, I should say unquestionably that the plaintiff cannot get it a second time. But have the jury so acted ? In the first place the learned Judge, in his charge, did, with perfect accuracy, tell the jury what it was that was to be the subject-matter of their consideration, in respect to the three different injuries they were to consider. The first was, what damages they would give in respect to the value of the clay taken away ; secondly, what damages they would give in respect to the injury to the ground, as a site for villas, by lowering the hill ; thirdly, what damages they would give in respect to the injury to the ground for agricultural purposes. The learned Judge, in the most express words, told the jury that they were to confine their attention, in estimating the damages upon each of these three heads, to each head by itself ; and that, in assessing the damages upon any one of them, they were not to include the damages upon either of the others. There was a direction, clearly expressed and perfectly legal. But what is the argument ? That, contrary to the charge of the learned Judge, the jury did in fact contravene his direction ; and, by implication, we are to take it that the jury, in assessing the damages in respect to the injury done to the land as a site for villas, did include, in the amount of deterioration in that respect, the value of the clay taken away. What authority have we for supposing that the jury violated the Judge's direction ; or would it be possible that the Judge should have taken a finding upon these three different heads, understanding that the jury had violated his special direction by their finding ? I am sure that the Judge would do no such thing. He would not direct the jury in one breath, and, in the next, sanction their violation of it, by receiving a verdict contravening his direction. And therefore, upon this record, there is no ground for any such presumption ; nor is there a word on the record to show that the jury did, in point of fact, include the value of the clay taken away in the amount of their finding of damages for the injury done to the land as a site for villas. How could they have done so, consistently with either the charge or with the evidence ?

The hill remained, after the clay taken out of the holes had been carried away and made into bricks; and the defendant now seeks to protect himself from paying damages for levelling the hill which remained, and destroying the peculiar feature which constitutes its value as a villa site, because he had previously taken away another part, of which he made bricks.

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On the whole, this appears to me to be a case in which the plaintiff is entitled to have a remedy for both these injuries, upon the pleadings, the evidence, and the point saved.

HAYES, J.

Now, that the judgment of the Court has been delivered, I may venture a word upon the view which I took at the trial, and which concurs with that of the majority of the Court. It did, and still does appear to me that to accede to this motion would be to give the plaintiff double damages. The view which I presented to the jury seemed to me to be warranted by two tests, which occurred to my own mind. I think I told the jury—at least I intended to tell them—that what they were to inquire into was, the amount of damages generally which had been sustained by the plaintiff; that that was a subject into which mixed considerations entered, and that the plaintiff had pressed his case on them in two or three ways; and with reference to them I asked their assistance. They answered that, in one view, namely, considering this clay as a chattel, the depriving the plaintiff of it injured him to the extent of £150, that being the full and absolute value of the clay; but that, considering the clay, not as a chattel, but as a part of, and attached to the freehold, and as such performing its duty of sustaining the ground at such a level, and with such an undulation of surface as made it a valuable permanent site for villas, the withdrawal of the clay from that office had done to the plaintiff a damage which the jury estimated at the sum of £156, viz., twelve years' purchase of £13 per annum. With these two answers before me, I think it would have been giving the plaintiff double damages if I had told the jury to add those sums together. First; try the matter by the very accurate test given by

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Coleridge, J., in *Morgan v. Powell* (a), namely, how much would it take to restore things to their former condition? When the clay was removed, and placed, as it were, in the adjacent field, the loss of the plaintiff in that respect was £150. But, to restore things to their former condition, all that was requisite was to replace that clay, or other similar earth, in its former position, for which the jury have given £150 as the value of the clay, and have allowed £6 for the spreading of it. Secondly; it was the plaintiff's loss, from the non-sustainment of the ground at a higher level, that was the subject of complaint in the first count; and it was the privation of this advantage as a building site, the fee-simple of which the jury valued at £156. Now, it is perfectly clear that the clay cannot serve the two purposes at the same time, viz., be the site of a house, and be manufactured into bricks; and therefore if the plaintiff gets the full and absolute equivalent in one respect, he ought not to have it in the other also. He may get a partial equivalent, or for some limited period, in one respect, and the residue only in the other. Thus, if the ground were only to be kept as villa ground for fifty years, the amount of damages which the jury would in that respect have awarded would be much less than £156: and the sum to be awarded as damage in the other respect, viz., the present value of clay to be removed by the purchaser at the end of fifty years, would not be more than the difference between the £156 and the amount of loss as building ground for fifty years.

Upon those grounds, I thought that the most convenient course was that which followed. I gave the plaintiff his choice which sum he would take. The verdict has been entered for the larger sum; and thus I believe substantial justice has been done.

(a) 3 Q. B. 278 (note, p. 279.)

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v.

THE WATERFORD AND LIMERICK RAILWAY CO.*

April 25, 26.
 May 7.

DEMURRER.—The writ of summons and plaint in this case contained three paragraphs. First paragraph :—"That the defendants "were, at the several times hereinafter mentioned, carriers of goods "for hire, from the city of Limerick to a certain place called the "Limerick Junction station, and that the plaintiff delivered to the "defendants, and the defendants received as such carriers, seven- "teen horses, the property of the plaintiff, to be taken care of, and "safely and securely carried by the defendants from Limerick to the "Limerick Junction station as aforesaid, and there, within a reason- "able time in that behalf, to be safely and securely delivered by the "defendants to the plaintiff; yet the defendants neglected for a long "and unreasonable time in that behalf to carry and deliver the said "horses as aforesaid, and unreasonably detained the said horses at "Limerick aforesaid for several hours, and did not take due care "thereof; but on the contrary allowed or caused the said horses "to be greatly frightened by divers noises while so detained; by "reason of which several of said horses were kicked and injured, "and several also became sick and diseased; and the said horses "were thereby greatly deteriorated in value; and the plaintiff has "expended large sums in curing said horses, to the plaintiff's "damage of £300."

Second paragraph :—"That, in consideration that the plaintiff "would deliver to the defendants, as and being carriers of goods "for hire, certain goods, to wit, seventeen horses of great value, "to be by the defendants carried from Limerick to the Limerick

A Railway Company introduced into a special contract for the conveyance of horses at a low rate, a condition exempting themselves "from all liability in respect of" the horses, "whether in the loading, unloading, or in the transit and conveyance of same, or whilst in" the Company's "vehicles, or on their premises."—*Held*, that the condition was in itself unjust and unreasonable.

Held also, that it could not be aided by an alternative condition, whereby the Company offered to "undertake the risk of conveyance only in consideration of an additional payment of £20 per cent. on the low rate of

charge;" but refused to entertain any "claim for damage sustained by any animal conveyed at such additional rate, unless the injury" was "stated and pointed out to the Company's agent at the time of unloading," that condition also not being in itself just or reasonable.

* Before LEFROY, C. J., O'BRIEN and FITZGERALD, JJ.

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"Junction station, and there delivered by the defendants for the plaintiff *within a reasonable time*, for reward to the defendants; "the defendants promised the plaintiff to carry the said horses from Limerick to the Limerick Junction station aforesaid, and there to deliver said horses within a reasonable time; and the plaintiff delivered the said horses to the defendants; and the defendants received the same for the purpose and on the terms aforesaid"— "[general averment of the performance of all conditions precedent] —"yet the defendants did not carry and deliver the said horses as aforesaid within a reasonable time, whereby several of said horses fell sick, and were injured and greatly deteriorated in value; and the plaintiff has been obliged to expend, &c."

Third paragraph:—"That, in consideration that the plaintiff would deliver to the defendants, as and being carriers of goods for hire, certain goods, to wit, seventeen horses of great value, to be by the defendants carried from the city of Limerick to the Limerick Junction station, and there delivered by the defendants for the plaintiff, for reward to the defendants; the said defendants promised to the plaintiff to carry said horses from the said city of Limerick to the said Limerick Junction station, and *there to deliver said horses at such an early hour on the day of their departure* from Limerick, that said horses might be carried from said Limerick Junction station to Dublin, and might reach the place last mentioned before the close of the same day; and the plaintiff hereupon delivered said horses to the defendants, and the defendants received the same for the purpose and on the terms aforesaid"—[general averment of the performance of all conditions precedent]—"yet the defendants did not carry and deliver said horses *within such a time and at such an hour* as they promised in that behalf; and, by reason of such their default, the said horses did not arrive at Dublin until long after the close of the said day; and several of the said horses, in consequence, fell sick," &c.—[Same conclusion as in the second paragraph].

Fifth defence to the first, second, and third paragraphs of the summons and plaint, and to each of them respectively—"That the horses were received, to be carried and conveyed by the defendants,

"from," &c., to, &c., "at a certain special reduced rate of charge, and under and subject to a certain contract, made between the plaintiff and the defendants, and signed by the plaintiff, whereby it was agreed that the said horses, being so received as in this plea mentioned, the defendants should in *no* case be responsible for the delivery of the said horses *at any particular time*, and should be free from *all* liability in respect of them, whether in the loading or unloading, or in the transit or conveyance of the same, or whilst in their vehicles or on their premises; and defendants say that the said alleged injury, damage, or deterioration, in the summons and *plaint mentioned*, occurred and was caused while the said horses were being loaded or unloaded, or in the transit or conveyance of the same, or whilst in their vehicles or on their premises."

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Replication:—"That the contract in the fifth defence mentioned was in the words and figures following:—

"Local Dealer 59

"WATERFORD AND LIMERICK RAILWAY.

"*Ticket for Horses and Carriages.*

"Date—2 | 11 | '61.

"From Limerick to Junction.

"Via

	RATE.		Amount paid.		
	A.—Low rate.	B.—20 per cent. extra.	£.	s.	d.
17 horses . . at Carriages (2 wheels) at (4 wheels) at	3s. 0d.		2	11	0
Total . . .			£2	11	0

"Owner's name—Lloyd.

"Groom's name—3 men.

"A. The Waterford and Limerick Railway Company undertake the conveyance of horses at the low rates of charges above stated, *solely* on the condition that they *shall be free from all liability in respect of them*; whether in the loading, unloading, or in the

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“*B. The Waterford and Limerick Company will undertake the risk of conveyance only in consideration of an additional payment of £20 per cent. on the low rate of charge; but no claim for damage sustained by any animal conveyed at such additional rate will be entertained by the Company, unless the injury is stated and pointed out to the Company's agent at the time of unloading.*”

“ And they will, in no case, be responsible for any greater value
“ of any horse than the sum mentioned in the Railway and Canal
“ Traffic Act of 1854; unless, at the time of delivery to the Com-
“ pany, the person sending or delivering the same shall declare it of
“ higher value; in which case the Company will charge, in addition,
“ £5 per cent. on the excess of value declared.”

"The above consignment has been delivered to the Company, to be carried by them at owner's risk, on the foregoing terms and conditions."

“ Value not declared.

“ And plaintiff says that said contract is not a just or reasonable
“contract.”

Demurrer thereto.*

First. That the question, whether said contract is just and reasonable, can only be material under the provisions of the Railway and Canal Traffic Act 1854; and it does not appear whether the plaintiff has relied on said Act in the pleadings.

Second. That, even if the plaintiff does rely on said Act, the gist of the action is not for any loss or injury within said Act.

Third. That, even if the gist of the action were for such loss or injury, it is immaterial whether said contract be just and reasonable or not.

Walter Boyd (with whom were Serjeant *Sullivan* and *S. Ferguson*), in support of the demurrer. E. T. 1862.
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The construction which the decision in *Armstrong v. Turquand* (a) put upon the Common Law Procedure Amendment Act (Ir.) 1853, ss. 63 and 64, enables the Court, upon the argument of a demurrer, to read the whole of a document relied on in the pleadings, though it has not been set out *verbatim*. This replication therefore has been filed, not for the purpose of stating the contract in full, but of referring to the jury, as an issuable fact, the justness and reasonableness of the conditions. But the 17 & 18 Vic., c. 31, s. 7, has left that question entirely to the decision of the Court or Judge; so that the replication is bad on that account. It is also bad because, as the conditions were contained in a special contract, signed by the sender of the horses, pursuant to the 17 & 18 Vic., c. 31, s. 7, it was not necessary that they should be just and reasonable. The first proviso in that section deals with conditions delivered to, but not signed by, the sender; and limits the Company's power to impose such conditions, by enacting that they shall be void unless they are just and reasonable in the opinion of the Judge or Court. A later proviso in the same section is conversant

(a) 9 Ir. Com. Law Rep. 32.

Fourth. That, if the justice or reasonableness of said contract, or of any of the conditions thereof, be material, such justice or reasonableness sufficiently appears in and by the terms thereof, and the facts in said defence stated.

Fifth. That the plaintiff, by admitting the existence of said contract, signed by himself, and by withdrawing the question of the justice and reasonableness thereof from due inquiry by the Court or Judge, at the trial, is estopped from averring that it is not just and reasonable.

Sixth. That the second breach, in the first paragraph, discloses no ground of action good in substance, because no duty is shown in the defendants to prevent said horses from being frightened; and the residue of the causes of action in that paragraph is well answered by the third condition of said contract, without reference to any question of justice or reasonableness.

Eighth. That the allegation of injury, in the first, second, and third paragraphs respectively, is remote, and disconnected from, and forms no part of the gist of the action, and is mere matter of aggravation; and the gist of the action in said respective paragraphs is well answered by said third condition, as aforesaid.

Ninth. That the replication is bad, for referring to the jury mere matters of law and of judicial opinion.

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with special contracts, signed by the sender; but does not require that the conditions in such contracts shall be just or reasonable.

The sender, who deliberately enters into and signs such a contract, must abide by its conditions, no matter how unfavorable they may be to himself: *Pardington v. The South Wales Railway Company* (a); *M'Manus v. The Lancashire and Yorkshire Railway Company* (b). No doubt, the judgment in the latter case has been reversed by the Court of Exchequer Chamber (c); but that decision has been disapproved of. In *Beal v. The South Devon Railway Company* (d), the Court dissented from that decision, though they held themselves bound by it. These cases show that condition A, in the present case, was just and reasonable *per se*. It provided that the defendants were to be exempt from *all* liability, because the sender elected to transmit his horses at the low rate of charge.—[O'BRIEN, J. Then the result is, that the defendants could not be made liable under condition A, in any case?]
—Yes, unless they were guilty of gross negligence; and that is just and reasonable, because the plaintiff elected to become his own insurer. Certainly, in *Harrison v. The London, Brighton and South Coast Railway Company* (e), a similar condition was held void, not *per se*, but upon the principle that the charge in the alternative condition under which the Company offered to undertake the risk was excessive. But, as the additional charge made in condition B here is moderate, the principle upon which *Harrison's case* was decided is in favor of the defendants. That condition A is just and reasonable *per se* also appears from *Phillips v. Edwards* (f); *Lewis v. The Great Western Railway Company* (g); *Beal v. The South Devon Railway Company* (h); and *Phillips v. Clark* (i). The last two of those cases show that a reservation in the special contract, exempting the defendants from *all* liability, as largely as condition A does in the present case, would not protect them from the consequences of gross

(a) 1 H. & N. 392.

(b) 2 H. & N. 693.

(c) 4 H. & N. 327.

(d) 5 H. & N. 875.

(e) 6 Jur., N. S., 954; S. C., 2 B. & Sm. 122.

(f) 3 H. & N. 813.

(g) 5 H. & N. 867.

(h) 5 H. & N. 875.

(i) 2 C. B., N. S., 156.

negligence.—[FITZGERALD, J. I think that the fifth defence should have stated that the injury was not occasioned by gross negligence.]

—No; for the defendants will be liable if the plaintiff *proves* gross negligence on their part; because the law incorporates into the special contract a condition that the defendants will not be guilty of gross negligence: *Lyon v. Mells* (a). The fifth defence amounts to this, that the defendants are not liable under the 17 & 18 Vic., c. 31, unless the plaintiff proves that they were guilty of gross negligence.—[O'BRIEN, J. But if the law imports into the contract a term that the defendants shall be liable for injuries occasioned by their own gross negligence, is it not necessary for them to aver that the injuries did not arise from their gross negligence?—It is not necessary to aver that which is an implication of law.

Again, the third paragraph assigns as a breach, that the defendants did not deliver the horses *at a particular time*. The special contract contains a condition exempting the defendants from liability on that account. That is a just and reasonable condition: *White v. The Great Western Railway Company* (b). But, even if the Court should think that condition A is *per se* unjust and unreasonable, the fact that the plaintiff had the option of sending his horses at the risk of the defendants, by payment of a moderate per-centage in addition to the low rate of charge, makes the whole contract just and reasonable. The existence of an alternative condition, which is just and reasonable, defeats the plaintiff's right of action: *Simons v. The Great Western Railway Company* (c); *Peek v. The North Staffordshire Railway Company* (d); *Ransome v. The Eastern Counties Railway Company* (e); and *McCance v. The London and North-Western Railway Company* (f).

The plaint states no cause of action within the 17 & 18 Vic., c. 31, s. 7, the words of which are, "shall be liable for the loss of, or any injury done to, any horses," &c. The gist of this action however is the *detention* of the horses: for all the remainder is mere matter of aggravation, which could not be traversed, as it is

(a) 5 East, 428.

(c) 18 C. B. 805.

(e) 8 C. B., N. S., 709.

(f) 7 Jur., N. S., 1304; S. C., 7 H. & N., 477.

(b) 2 C. B., N. S., 7.

(d) 9 EL. & BL. 958.

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stated under a *virtute cuius*, and introduces a consequence from what went before: *Bennet v. Filkins* (a), and *The Times Fire Insurance Company v. Hawke* (b). Besides, the averment is, that the defendants "allowed or caused" the horses to be greatly frightened. Consistently with that averment, the fright of the horses might have been produced by some cause, such as a clap of thunder, wholly beyond the control of the defendants, and for the result of which the defendants cannot be held responsible.

Dillon and J. E. Walsh, contra.

The question is, whether these two conditions (A and B), taken either together or separately, can be deemed just and reasonable, within the meaning of the 17 & 18 Vic., c. 31? Condition A amounts to this:—"We, the defendants, will make a contract with you, the plaintiff, to carry the horses at a low rate of charge, but will not be liable for its breach in any event whatsoever." No person should be allowed to hold out such a stipulation to the public. It is unjust and unreasonable *per se*, and therefore cannot be cured by an alternative offer by the defendants to keep their contract; provided that the plaintiff will pay £20 per cent. in addition to the low rate of charge. But, supposing that the two conditions are read together in this way—"We will not carry goods of a particular kind (horses) *at all*, unless the sender pays the higher rate of charge," even that would be unjust and unreasonable; because there is attached to it a stipulation that the defendants will not entertain any claim for compensation for loss or injury, unless it is pointed out to the defendants' agent *at the time of unloading*—that is to say, before it can be known, for there are many injuries which could not be discovered by that time. Neither of these propositions conflicts with any of the authorities cited on behalf of the defendants. Of those authorities, four were decided before the decision of the Court of Exchequer Chamber, in *M'Manus v. The Lancashire and Yorkshire Railway Company* (c), was given; and are all overruled by that decision, which reversed the judgment of the Court

(a) 1 Saund. Rep., by Wms., 23, note 5.

(b) 28 L. J., N. S., Exch., 317.

(c) 4 H. & N. 327.

of Exchequer in the same case (a), in which that Court had merely followed its own previous decision in *Pardington v. The South Wales Railway Company* (b); the condition in which cannot be distinguished from that which has been held void in *M'Manus's case*, which has also overruled *Wise v. The Great Western Railway Company* (c). Also, in *Simons v. The Great Western Railway Company* (d), the condition was held unreasonable, upon the ground that the Company sought to exempt itself from liability for the non-delivery of a package, because it was badly packed. The condition in that case must be read as applying to the carriage of a particular species of goods, which were to be loaded and unloaded by the owner himself [*see* condition 8, p. 810], and only particular classes of loss or injury were to be provided against. Therefore the condition in that case did not, as condition A does here, seek to save the Company from liability with respect to *all* injuries; and, even if it had, that case has been overruled by *M'Manus's case*, which has definitively settled that an unqualified contract by a Company, to carry cattle or goods, without being liable for the risks in *any* case, is unjust and unreasonable.

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But the defendants contend that *Peck v. The North Staffordshire Railway Company* (e) has established a distinction that, although a condition which exempts a Company from *all* liability in *every* case is void *per se*, yet that, if there be an alternative condition under which the owner may, by paying a moderately increased charge, send his goods or cattle at the Company's risk, that makes just and reasonable a condition which would otherwise be unjust and unreasonable. In that case, one of the conditions was, "that the Company shall not be responsible for the loss of "or injury to any marbles unless declared and insured "according to their value." But the defendants in that case were not bound, as common carriers, to carry the marbles. At all events, they had a right to say that they would not carry the marbles except at the highest rate of charge allowed by their Act.—

(a) 2 H. & N. 693.

(b) 1 H. & N. 392.

(c) 1 H. & N. 68.

(d) 18 C. B. 805.

(e) 9 EIL. & BL. 958.

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[LEFROY, C. J. How can you maintain that a common carrier Company might exempt themselves from carrying some kinds of goods?—Because, if a Company held themselves out as common carriers of certain classes of goods only, they need not carry other descriptions of goods. In that case, the Company in fact refused to carry the marbles *at all*, unless the owner declared their value and gave certain other information. But that was essentially distinct from the present case, in which the defendants undertake to carry the goods at a low rate of charge, but refuse to be liable for *any* breach of their contract, unless they are paid a higher rate of charge. *Ex necessitate rei*, people have no opportunity to consider deliberately the nature and terms of these contracts; and therefore the statute says that they must be just and reasonable, and that Companies shall not enter into a contract which they at the same time declare to be valueless.

But the defendants have relied upon two cases which have been decided since the Court of Exchequer Chamber gave judgment in *M'Manus's case*. One of those cases is *Lewis v. The Great Western Railway Company (a)*. But in that case three days were allowed to make a claim for compensation; and yet the Court doubted whether that was a reasonable time. If three days were barely sufficient, a condition [*B*] which makes it necessary to point out the injury *at the time of unloading*, cannot be reasonable. Again, in *Beal v. The South Devon Railway Company (b)*, the defendants refused to be liable for injury or loss arising “from any cause whatever, other than gross negligence or fraud;” and that exemption was held not to be an evasion of the decision in *M'Manus's case*, on the ground that it only applied to a particular species of goods which were of a perishable nature. Therefore, these two subsequent authorities do not establish the proposition that a condition, which is *per se* unjust and unreasonable, can become just and reasonable because it is accompanied with another condition which is just and reasonable. Therefore, condition *A* is void.

But, furthermore, condition *B* is not just and reasonable *per se*,

(a) 5 H. & N. 867.

(b) 5 H. & N. 875.

for the likelihood is, that cattle during the transit will receive some injury to their health, which cannot be discovered and pointed out at the time of delivery. An internal hurt could not be so quickly discovered; and, even though every injury could be so found out, how could a consignee make a claim at once on the Company's agent, when he does not know whether the claim is to be made against the consignor or against the Company? Must the consignee in every case make two claims, one of which *must* be unjust?—[O'BRIEN, J., referred to *Garton v. The Bristol and Exeter Railway Company* (a)].

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Lastly, there is, on the whole of the pleadings, taken together, a good cause of action wholly unanswered; for the stipulation that the Company would not be liable for non-delivery at any particular time, does not exempt them from liability on their contract to carry the horses to Dublin in a reasonable time. One of those contracts does not negative or qualify the other.

Serjeant *Sullivan*, in reply.

The decision of the Court of Exchequer Chamber, in *McManus's case*, does not touch the present case at all; for the question respecting the insurance rate and the non-insurance rate was not discussed there. Condition A would have been unreasonable if the defendants had not given the plaintiff the option of sending the horses at their risk. But if a man who had the option of sending his goods or cattle at the defendant's risk, upon payment of a slightly increased rate of charge, much lower than that allowed by the Company's Act, chose, with his eyes open, to sign a contract containing these conditions, and pay the low rate of charge, the conditions are reasonable, and he cannot complain; and the Court will not listen to the argument that the customer had not sufficient time to consider the terms of the contract before he signed it. The Court of Exchequer Chamber, in *Peck v. The North Staffordshire Railway Company* (b), held it a reasonable condition "that the Company shall

(a) 1 Best & Smith, 112; S. C., 7 Jur., N. S., 1234.

(b) 9 Ell. & Bl. 986.

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Queen's Bench “ . . . unless declared and insured according to their value.” The
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 v. chances of imposition upon the defendants in the carriage of horses
 WATERFORD exposes them to more risks than they run in carrying marbles; and
 AND it would be absurd to say that a contract made with respect to
 LIMERICK horses is unreasonable, though less stringent than that made with
 RAILWAY. respect to marbles, unless there be different principles applicable to
 the two subject-matters. The case of *Harrison v. The London, Brighton and South Coast Railway Company* (a) recognised the doctrine “that a condition is reasonable and proper which meets “the evil of the monopoly of Railway Companies, and which gives “the party the alternative of paying the extra rate of charge, or “doing something which is reasonable”—[*per* Blackburn, J.]; but the Court there held that the extra charge was excessive, and that the condition was upon that account unreasonable. The same principle has been recognised in *M'Cance v. The London and North Western Railway Company* (b).

Condition *B* is reasonable *per se*; for, although it requires the owner, at the time of unloading, to point out any injury for which he claims compensation, yet it only means *patent* injuries. That condition is necessary to protect the Company against claims made for injuries sustained when leaving the station, or afterwards. If the defendants pleaded this condition in bar, and the plaintiff replied that the injury was a *latent* one, that replication could not be demurred to. In the present case, three men got free passes to travel with the horses; and they should have been able to point out any injury sustained during the transit, for they travelled in the trucks along with the horses.

As to the form of pleading, it is no doubt anomalous for a defendant to say “I entered into another contract.” The old rule would have required them to traverse the contract, and say “I did not enter into *that* contract at all.” But this form of pleading has been recognised in this Court, in the case of *Kenyon v. Tayleur* (c).
Cur. ad. vult.

(a) 6 Jur., N. S., 954; S. C., 2 B. & Sm. 122.

(b) 7 Jur., N. S., 1304; S. C., 7 H. & N. 477.

(c) 8 Ir. Com. Law Rep., App. 76.

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In this case, we cannot go beyond a mere decision upon the particular point which has arisen in the case. To attempt to express any opinion, or to announce anything with respect to the general law of the liability or responsibility of Railway Companies, would really be more than hazardous. It would be presumptuous to affect to announce the law as to its general effect, considering the state of uncertainty in which it appears to be in England. What the law is, or what it might be found to be by the time that this case arrives at its ultimate destination, it would be more than hazardous to conjecture. Upon this general question therefore we shall not affect to give any opinion. It is enough to say that, in the last decision upon the subject, there is sufficient to be found to enable us to decide this case. The question in it comes to this, whether this contract comes within the principle that, if a fair and just contract be made, it is open to the parties to act upon the alternative condition in it announcing the terms upon which the Company are willing to undertake more or less responsibility. In this case it comes to the question, was that a fair contract which gave an alternative condition, such as has been here given—that the party might choose to take upon himself the responsibility of the Company to a certain extent, or might leave it to the Company to be, as it were, the insurers? In this case, the plaintiff had an alternative; and, if the alternative was both fair and reasonable, we think that the contract would be in itself just and fair. But, in order to make a contract of that species just and fair, both the terms of the alternative condition must be just and fair. We conceive that one of the terms of the alternative condition in the present case is not just and reasonable—that the term imposed on the owner of pointing out, *at the time of unloading*, to the Company's agent any injury which the cattle might have received in the transit, is not reasonable or fair. Looking at the circumstances under which goods of any sort—and particularly goods of this kind—are delivered to Railway Companies to be carried—remembering the small opportunity there is for a deliberate examination of the cattle on their arrival—and

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regarding the length of time which in other cases has been considered the fair limit to give the parties within which to examine the cattle, and apprise the Company of the injuries which they might have received in the transit, and to complain of defects in respect to the performance of the contract, we do not think that this term of the alternative condition is fair or just; and if both the terms of the alternative condition be not just, fair and reasonable, it is not a fair proposal. Without expressing any opinion of my own—and, least of all, on behalf of the Court—it would appear to myself that the very least opportunity that should be given to the party for examining into and reporting to the Company's agent any defects that might be discovered, should be until the cattle leave the Company's premises. That should be the very least period of time allowed for discovering and reporting the injuries. However, I apprehend that the Court do not take upon themselves to give any opinion, whether even that period of time would be sufficient or not. But when one considers the case of the arrival of cattle at night in the dusk, or the very circumstance of the hurried manner in which they are delivered to the owner, it would be most unjust and unreasonable to preclude him from obtaining compensation for any injury arising in the transit, and bind him by such a condition as that.

Under these circumstances, we say that the contract or condition in this case was not a just or fair one; and that therefore the Company must be liable. The demurrer must therefore be overruled.

O'BRIEN, J.

I am also of opinion that the demurrer taken by defendants to plaintiff's replication should be overruled. The first question is, whether the provisions of the 7th section of the Railway and Canal Traffic Act (17 & 18 *Vic.*, c. 31), which make null and void all notices, conditions, and declarations limiting the liability of a Company for loss or injury to any horses, cattle, goods, &c., except such conditions as the Court or Judge should consider just and reasonable, extend to cases in which such conditions, &c., are embodied in

a special contract, signed, in conformity with the subsequent proviso of that section, by the owner of the cattle, &c., or by the person delivering them to the Company. Upon this question, I think we are bound by the decision of the Court of Error in England, in the case of *M'Manus v. The Lancashire and Yorkshire Railway Company* (a). In that case, the condition limiting the liability of the Company was contained in a document signed by the owner, and the Court of Exchequer had decided that the Company were thereby exonerated from liability; but the Court of Error (Erle, J., dissenting) reversed that decision; being of opinion that the condition was unreasonable, and was accordingly void, under the provisions of the 7th section. The Court of Error decided that case upon the ground that those provisions extended to all cases where the Company sought to relieve themselves from liability for such loss or injury by relying on any special conditions, whether those conditions were contained in notices acquiesced in by the owner, or in a special contract, signed under the subsequent proviso in said 7th section. The effect of this decision is, that where any cattle, goods, &c., are delivered to a Company, for the purpose of being carried, no contract, however special, and though signed by the owner or person delivering such cattle, goods, &c., can relieve the Company from liability for the neglect or default of themselves or their servants in respect of such cattle, goods, &c., except the terms of such contract are considered by the Court to be just and reasonable.

It has been urged by defendants' Counsel, that, in the subsequent case of *Beale v. The South Devon Railway Company* (b), some of the Barons of the Court of Exchequer in England expressed, in strong terms, their disapprobation of this decision. But in that case, Mr. Baron Martin, who had delivered the original judgment of the Court of Exchequer in *M'Manus's case*, stated that he considered himself bound by the authority of the Court of Error. That decision has not been appealed from; it has, on the contrary, been recognised and followed by other Judges, in some of the cases cited in the argument: and we should accordingly be bound by its authority, even though we disapproved of it. For my own part,

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I entirely concur in the principle of that decision. It would materially restrict the operation of the statute, and would be inconsistent with the manifest intention of the Legislature in passing it, to hold that Railway Companies, who have acquired almost a monopoly of traffic, and to whose terms the public are in great a measure compelled to accede, could evade the statute, by having a delivery-ticket prepared with clauses relieving them from all responsibility; and then refusing to take the cattle, goods, &c., except the ticket was signed by or on the part of the owner. He may have no other alternative than that of sending his cattle, goods, &c., by the Railway, on such terms as the Company thought fit to impose, or of not sending them at all. In many cases he would be compelled to submit to those terms, however unjust he might regard them; in other cases, from the manner in which the Railway traffic of this country is carried on, the ticket would be signed by or on the part of the owner as a matter of course, without considering the effect of its terms; and Railway Companies would thus be enabled (notwithstanding the statute) to secure for themselves that exemption from liability which they had previously enjoyed, and of which it was the manifest intention of the Legislature to deprive them.

The next question for our consideration is, whether the conditions in the delivery-ticket, relied on by defendants in this case, are just and reasonable. With respect to the first of them (that marked *A*), it was virtually conceded by defendants' Counsel that, if the provisions in it, exempting the Company from liability, stood alone and unqualified, they could not contend that it was either just or reasonable. It is almost sufficient to read that condition, to show that it would be both unjust and unreasonable to bind the party by its terms.—[Read condition *A*.]—It would follow from that condition that, however remiss the Company or their servants may be in discharging their manifest duty, however gross may be their neglect or misconduct, they would still be exempted from all responsibility; and I need not say that such a result would be utterly repugnant to justice.

It has however been contended, by defendants' Counsel, that as this first condition (*A*) applies only to the conveyance of horses at

the low rate of charge, the objection to it is removed by the second condition (marked *B*), which enabled the plaintiff, on payment of a moderate increased rate of charge, to have his horses conveyed at the risk of the Company; that the exemption of the Company from all liability, under condition *A*, ceased to be unjust or unreasonable when plaintiff had, under condition *B*, the option, on reasonable terms, of imposing that liability upon them; and that as plaintiff, instead of doing so, chose to adopt the provisions of condition *A* as his contract with the Company, and thereby avoided the payment of the increased rate of charge, he cannot now get rid of that condition on the ground of its being unreasonable. There would be weight in this argument if condition *B* was, in itself, unobjectionable; but there is a provision in it that, even in cases where the increased rate of charge is paid by the owner, the Company should be exempted from liability for any damage to the horses, "*unless the injury is stated, and pointed out to the Company's agent, at the time of unloading.*" I concur in the opinion of my LORD CHIEF JUSTICE, that this provision would be an unjust and unreasonable one to impose upon the owner. In many cases, where injury had in fact been sustained by the horses, it would be impossible for the owner or his servant to comply with that provision; or to ascertain, at the time of unloading, whether the horses had been injured to any and what extent. It follows therefore, in my opinion, that condition *B*, as qualified by this provision, is invalid, and cannot be relied on as remedying the objection to condition *A*, or as giving plaintiff the power, by adopting it, of entering into a just and reasonable contract with the Company as to their liability. Defendants' Counsel however have further argued that, assuming this provision in condition *B* to be unjust and unreasonable, it would then, under the statute, be null and void; and that therefore, if plaintiff had paid the increased rate of charge, he would have been entitled to make the Company liable, notwithstanding the insertion of such proviso; and that accordingly, as plaintiff had still the option, on reasonable terms, of making the Company liable, he could not contend that condition *A*, which exempted them from all liability,

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was unjust or unreasonable. With respect to this argument, it appears to me that, although if plaintiff had paid the increased rate of charge under condition *B*, he could hold the Company liable, notwithstanding his non-compliance with the proviso in question, on the ground that the proviso was not just or reasonable, yet that it is not open to the Company to rely on such a result, as removing the objection to condition *A*. It is requisite, under the statute, that any conditions, made for the purpose of limiting the Common Law liability of the Company, should, in order to have that effect, be just and reasonable. In deciding whether any condition relied on for that purpose is just and reasonable, we should consider it in the terms in which it is framed by the Company; and if the condition, as so framed, be unreasonable, on account of any proviso inserted in it, I do not think the objection is answered by saying "that such "proviso is null and void under the statute; and that the condition should be considered as if the proviso was expunged from "it; in which case it would be a just and reasonable condition, on "which the Company might rely." If, as in the case now before us, the Company rely on a subsequent condition, as removing the objections to a previous one, they must, in my opinion, rely on it in its entirety, and as it has been framed; and if, as so framed, it also is invalid under the statute, it cannot have the effect of giving validity to such previous condition. It may be just and reasonable that the liability of a Company for the conveyance of animals, goods, &c., should be limited to cases where a moderate increased rate of charge is paid by the owner, and that accordingly a condition to that effect should be made; but such condition should not include a further proviso, which, if carried out, would render the entire condition unjust and unreasonable. Though such proviso be invalid under the statute, the insertion of it in the condition may naturally deter the owner from availing himself of that condition at all, by making the increased payment; as he might consider that, by reason of the proviso, the payment would probably be productive of no benefit to him in the event of any injury being sustained by his property.

Some objections were taken by plaintiff's Counsel, during the

argument, as to the frame of the fifth defence, to which plaintiff's replication was filed. I think it unnecessary to consider them, being of opinion that the replication is a good and sufficient answer to the defence; and that there should therefore be judgment for plaintiff on this demurrer.

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FITZGERALD, J.

I concur in the judgment pronounced by the LORD CHIEF JUSTICE, and in the reasons given by my Brother O'BRIEN, save that I refrain from expressing any opinion upon *M'Manus's case* (a). We are bound by that decision, on the 7th section of the Railway and Canal Traffic Act (17 & 18 Vic., c. 31), until it shall have been overruled by a superior authority. That leaves, as the only point for our decision, the question whether these conditions are just and reasonable, within the meaning of the Railway and Canal Traffic Act?

My judgment rests upon the first paragraph of the writ of summons and plaint, which, after stating the liability of the defendants, as carriers of goods for hire, from the city of Limerick to the Limerick Junction station, states "That the plaintiff delivered to the defendants, and the defendants received as such carriers, seventeen horses, the property of the plaintiff, to be taken care of, and safely and securely carried by the defendants from Limerick to the Limerick Junction station, and there, within a reasonable time, to be safely and securely delivered by the defendants to the plaintiff, yet the defendants neglected, for a long and unreasonable time, to carry and deliver up the said horses as aforesaid, and unreasonably detained the said horses at Limerick aforesaid for several hours."

The complaint is not that the defendants delivered the horses at the Limerick Junction station at an unreasonable time; but is for the unreasonable detention of the horses at Limerick *at the commencement* of the journey. The plaint then avers "That the defendants did not take due care of the horses, but on the contrary allowed or caused the said horses to be greatly frightened by divers noises

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"while so detained, by reason of which several of said horses were
 "kicked and injured, and several also became sick and diseased;
 "and the said horses were thereby greatly deteriorated in value;
 "and the plaintiff has expended large sums in curing said horses."

I call attention to the shape of that paragraph especially, because, as to the two other paragraphs, there is a condition or portion of the special contract which, if it alone had been relied upon, I would probably consider just and reasonable, and an answer to the second and third paragraphs. But, as to the first paragraph, which complains of the detention of the horses at Limerick, the defence pleaded to it is, "That the horses were received to be carried and conveyed by
 "the defendants, for the plaintiff, from Limerick to Limerick Junction station aforesaid, at a certain special reduced rate of charge,
 "and under and subject to a certain contract, made between the
 "plaintiff and the defendants, and signed by the plaintiff, whereby
 "it was agreed that the said horses being so received, as in this plea
 "mentioned, the defendants should in *no* case be responsible for the
 "delivery of said horses at any particular time, and should be free
 "from *all* liability in respect of them, whether in the loading,
 "unloading, or in the transit or conveyance of the same, or whilst
 "in their vehicles or on their premises. And the defendants say
 "that the said alleged injury, damage or deterioration, in the summons and plaint mentioned, occurred and was caused while the
 "said horses were being loaded or unloaded, or in the transit or
 "conveyance of the same, or whilst in their vehicles or on their
 "premises."

In the argument, it was almost conceded that the first term or condition of the special contract would, if taken by itself, be unjust and unreasonable, as it sought to excuse the defendants from *all* liability under *all* circumstances; but it was contended that, there being an alternative condition, of which the plaintiff might make choice, that makes the whole just and reasonable. That alternative condition is not alluded to or set out out in the fifth defence; and I expressed a doubt whether the pleader can ask the Court to permit him to rely upon a document which is not before us.

But, as the plaintiff has set out the whole of the special contract in his replication, I think that we can look at it in aid of the defence, as it is upon the whole of the record and pleadings that we are to give judgment.

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As to the first paragraph, I should, in the first instance, state that condition *A*, the first portion of the special contract, is unreasonable, as it stands. That condition is:—"The Waterford and Limerick Railway Company undertake the conveyance of horses at the low rates of charges above stated, *solely* on the condition that they shall be free from *all* liability in respect of them, whether in the loading, unloading, or in the transit and conveyance of the same, or whilst in their vehicles or on their premises." If that condition stood alone, it would not, in my opinion, be a just and reasonable condition, as it excludes the possibility of the defendants being liable under any state of circumstances. But then we have to see whether condition *A*, when aided by condition *B*, the alternative, becomes just and reasonable. Condition *B* is this:—"The Waterford and Limerick Company will undertake the risk of conveyance only in consideration of an additional payment of £20 per cent. on the low rate of charge." If the condition had stopped there, I would, notwithstanding the able argument addressed to us on behalf of the plaintiff, have probably come to the conclusion that the whole contract was just and reasonable; for, whilst at the low rate of charge the defendants sought to excuse themselves from liability, they at the same time offered an alternative that, upon the payment of £20 per cent. additional, the defendants would become responsible for the safe carriage of the horses. But the question is, whether condition *B*, when taken altogether, including not only the part which I have read, but also the remaining portion which I am now about to read, is just and reasonable. The remainder of it is this:—"But no claim for damage sustained by any animal conveyed at such additional rate will be entertained by the Company, *unless* the injury is stated and pointed out to the Company's agent *at the time of unloading.*"

In the course of the argument, and before Mr. Serjeant *Sullivan*

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commenced his reply, attention was called by the Court to this term of the contract; and it was pointed out to Counsel that this term appeared to the Court to be in itself unjust and unreasonable; but we did not hear from the learned Serjeant a single observation to relieve us from that impression. Condition *B* cannot be separated into two portions. It is one entire alternative offer by the Company to undertake the risk of conveyance upon payment by the owner of the horses of £20 per cent. in addition to the low rate of charge; *but* that *no* responsibility shall attach to the Company on account of any injury done to the animals, unless it is pointed out to the Company's agent *at the time of unloading*. We are all of opinion that to allow Railway Companies to bind parties by this kind of condition would be unjust and unreasonable; and as condition *A*, taken by itself, is unjust and unreasonable, it cannot possibly be aided by condition *B*, which is not in itself just or reasonable. Therefore, the plaintiff is entitled to judgment upon the first paragraph.

There are two other paragraphs, as to which different considerations are applicable; but which now become comparatively unimportant. The second paragraph may possibly be considered as going for the non-delivery of the horses within a reasonable time. It does not complain of any default on the part of the defendants during the transit; and the third paragraph is framed on the special contract to convey the horses from Limerick to the Limerick Junction station, *at such an early hour on the day of their departure* from Limerick, that they should be delivered at the Limerick Junction station *in time to reach Dublin before the close of the same day*. Now, there is a term of the special contract which, according to my present opinion, would be applicable to both the second and third paragraphs. The term is that:—"The Company will in no case be responsible for the *delivery of horses at any particular time*, or for any particular *market or race-meeting*." If the defendants had relied upon that term of the special contract, and upon that term alone, as a condition applicable in answer to the second and third paragraphs, it might possibly be that we should have been obliged

to give judgment in their favor. But the present defence is no answer to the action; and the defendants having mixed up the terms together in one defence to all three paragraphs, ask us whether condition *B*, without the addition of this term, is a just and reasonable condition? The opinion of the Court is, that condition *A*, so taken, is not a just and reasonable condition, and that the plaintiff is entitled to our judgment on the second and third paragraphs also. If the plaintiff goes further, it will be for him to consider how far he will be able to maintain his action upon the second and third paragraphs.

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COURT OF CRIMINAL APPEAL.

THE QUEEN v. MARY JOHNSTON.*

Jan. 23.

April 13.

M. J., suspected of having committed felony, was followed and stopped by a constable in plain clothes. The constable having told M. J. what he was, and that she (M. J.) was charged with felony, proceeded to put several questions to her, relative to a parcel in her hand, which contained the goods supposed to have been stolen. At the time he asked the questions, the constable had not told M. J. that she was under arrest, "but he would not have let her go." He did not expressly hold out any threat or inducement

THE following case was reserved from the Commission Court for the county of Dublin, by the Hon. Justice O'BRIEN and the Hon. Justice CHRISTIAN.

The prisoner was tried before us, on the 9th of December last, at the Commission for the county of Dublin, for having feloniously stolen eight boots, the property of William Hutchings.

The first witness examined was Mr. W. Hutchings, who stated town; that prisoner came into his shop on Saturday the 28th of to the effect that he kept a boot and shoe and leather shop in Kings- November last, and asked to be fitted with a pair of boots, which was done. That at her request he allowed her to remain in the shop for some time; that, while she was there, he went out of the shop, and left his assistant, P. Redmond, there; and that when witness returned to the shop, in about a quarter of an hour, the prisoner had gone; that she returned in about ten minutes afterwards, and said that the boots she selected were rather tight, and that she wished him to take her measure for another pair; that he did so, and asked for her address; that she gave her name as Miss Johnston; told him to send the pair of boots to Mr. Knight's shop in Kingstown, and that she left witness's shop in a couple

to M. J.; nor did he, before she answered him, give her any caution. M. J. having answered the questions, the constable then told her she was not bound to say anything that would criminate herself; and said he should bring her to the police-office. —Held, by eight Judges, that the conversation between M. J. and the constable was receivable in evidence; and, by three Judges, that it was not so receivable

Cases on this point generally reviewed.

* *Coram* LEFROY, C. J., MONAHAN, C. J., PIGOT, C. B., BALL, KEOGH, O'BRIEN and HAYES, JJ., FITZGERALD and HUGHES, BB., FITZGERALD, J., and DEASY, B.

of minutes afterwards. That on the next day, two detective policemen called on him, and brought him four odd boots, which were his. These boots were produced to witness at the trial, and appeared to be all for the right foot. Witness stated he had the fellows of them all, and produced them at the trial. He also stated that he had all the right boots in his shop on the morning of the 28th of November, and that he did not give them to the prisoner.

This witness was cross-examined as to the fact of the boots brought to him by the policeman being his; and also as to whether they might not have been sold in the shop by his niece, who sometimes sold boots for him, or by his assistant, said P. Redmond, who were not examined.

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The second witness was William Doyle, a policeman. He stated that, on Saturday the 28th of November last, he and another policeman (Inspector M'Dermott) followed the prisoner from Dublin to Kingstown, by railway; that they followed her to several places in Kingstown, and saw her go on two occasions into Mr. Hutchings's shop. That then they followed her to the railway station at Kingstown, and went back to Dublin in the same train with her. That she had a small paper parcel and a bag in her hand when going into the train at Kingstown; and that at Westland-row station she laid the parcel on the ticket-office. That Inspector M'Dermott and witness (who were both in plain clothes) then went up to her. Witness stated what took place on their going up to her as follows:—"I told her we belonged to the police, and that she was described to us as having stolen boots from shops in the city. I also said to her that she was charged as committing felony. I asked her what she had in the parcel. I would not have let her go; but I did not tell her that I would not do so."

Witness was then asked by the Crown Counsel "what did the prisoner say to you when you asked her what she had in the parcel?"

Mr. Curran, prisoner's Counsel, objected to that question; and the witness being further examined, then stated as follows:—

"I did not, before I asked her that question, or before the prisoner answered it, give her any caution, or hold out any inducement,

H. T. 1864. "and I have stated all that was said between us. I do not
Crim. Appeal. "recollect Inspector M'Dermott saying anything to her at all."

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Witness then stated (subject to the objection of prisoner's Counsel):—"Prisoner said she had two pair of boots in the parcel; and
 "I then, before I said anything else to her, took the parcel from
 "her; and then I again asked her where she got them."

Prisoner's Counsel then objected to the witness stating what the prisoner said in reply to the witness, and relied, amongst other things, on the decision of the present Lord Chief Baron, in the case of *Regina v. Bodkin (a)*. The evidence being pressed by the Crown Counsel, we stated that we would receive the objection, and that we would reserve the question of its admissibility for the consideration of the Court of Criminal Appeal. The witness then stated that, when he asked the prisoner where she got the boots, she said that "she was made a present of them in Kingstown;" and the witness also stated (subject to the like objection and reservation) the subsequent part of the conversation between him and the prisoner on that occasion, as follows:—"I said to the prisoner
 "that I saw her in Mr. Hutchings's shop in Kingstown; and I
 "asked whether it was there she got them; she said yes; and
 "that she took them out of that. I then told her, after she
 "answered the foregoing questions, she was not bound to say
 "anything that would criminate herself; and I told her that we
 "should arrest her, and bring her to the police-office, which we
 "did. I kept the boots"—[witness identified them as those already
 produced to Mr. Hutchings].

The jury found the prisoner guilty. Another indictment had been found against her at the same Commission, the trial of which was postponed till next Commission. We did not sentence the prisoner; but decided she should be kept in custody, and postponed her sentence till the opinion of this Court should be taken as to the admissibility of all the evidence objected to by prisoner's Counsel, as above mentioned.

We therefore request the opinion of the Court, whether the entire of the evidence objected to by the prisoner's Counsel as aforesaid

was legally and properly admissible. If any portion of said evidence was not legally and properly admissible, then the conviction is to be reversed.

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10th Jan. 1864.

J. CHRISTIAN.
JAMES O'BRIEN.

J. A. Curran (with him *Molloy*), for the prisoner.

The general rule of law on this point is to be found in *Regina v. Baldry* (a). There, Lord Campbell, C. J., says:—"Prisoners are "not to be interrogated. By the law of Scotland they may be; "but by the law of England they cannot" (p. 441). Any examination of a prisoner is considered to be a privilege in his favor, and not an additional peril to him: 1 *Ch. Cr. Law*, p. 84; *Hayes Cr. Law*, p. 254; *Stephen. Cr. Law*, p. 190.

There are some authorities apparently on the other side, but which are all distinguishable: *Rex v. Thornton* (b). There was no threat or promise in that case; and the point of that case has been differently decided since that date (1824): *Rex v. Wild* (c). In that case the question was not asked by any person in authority: *The King v. Gibney* (d). In that case the evidence was admitted, because there was no threat of a temporal nature held out. There is a very strong expression of Doherty, C. J., on this subject, in *Regina v. Hughes* (e). In *Regina v. Doyle* (f) evidence of this kind was excluded. *Regina v. Devlin* (g) is to the same effect. *Regina v. Toole* (h); *Regina v. Hassett* (i); *Regina v. Bodkin* (k). —[Pigot, C. B. I think it right to state that, in that very case, I received evidence of a voluntary statement made by the prisoner to the policeman, previous to the question having been put to him by the policeman.]—*Tay. Ev.*, sec. 798, and *Regina v. Pettit* (l) were also cited.

(a) 2 Den. C. C. 430.

(c) 1 Moo. C. C. 452.

(e) 1 Cr. & Dix. Cir. C. 13.

(g) 2 Cr. & Dix. Cir. C. 157.

(i) 8 Cox. Cr. L. 511.

(b) 1 Moo. C. C. 27.

(d) Jebb. Res. Cas. 15.

(f) 1 Cr. & Dix. Cir. C. 396.

(h) 7 Cox. Cr. L. 244.

(k) 8 Ir. Jur., N. S., 340.

(l) 4 Cox. Cr. L. 164.

H. T. 1864. *Beytagh* for the Crown (with him the *Solicitor-General*, Serjeant
Crim. Appeal. *Sullivan*, and *C. R. Barry*).

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The question is, whether the mere fact that the evidence consists of an answer to a question put by a policeman to a prisoner, renders the evidence inadmissible. I admit the prisoner was in custody at the time the question was put, although she was not aware of that fact. A material fact in the case is, that there was no threat used by the policeman, nor any inducement held out to her to confess. The fair inference from the evidence is, that there was neither caution, threat, or inducement in the case.

I shall first refer to some passages in various text-books on the subject. They show, at all events, the general opinion of the Profession on this point: *Arch. P. and E.*, p. 203 (ed. 1862); *Tay. Ev.*, sec. 804; 1 *Hayes Cr. L.*, p. 255; *Joy on Confessions*, pp. 34, 42. These passages show that, as a general rule, it is not sufficient, in order to exclude a statement made by a prisoner, to show that it has been elicited by a question put by a person in authority. I now come to the cases.

Rex v. Gibney (a). This was the judgment of the Judges of Ireland forty-four years ago. I submit that it cannot be held to be overruled by decisions of single Judges subsequently.—[The LORD CHIEF JUSTICE. The principle upon which that case was decided was, that the confession was a voluntary one. There was this foundation for their so holding, that the prisoner stated that his conscience would not let him conceal the crime any longer.—MONAHAN, C. J. Yet they must have decided that the confession did not cease to be voluntary, from the fact of its having been elicited by a number of questions. A great number of questions were asked in that case, and some of them assumed the prisoner's guilt. No objection was taken on that head. The question as to the evidence being inadmissible, because it was elicited by questions put by a person in authority, was not argued.]—The next case is one before Crampton, J., *Regina v. Hughes* (b).

There are numerous cases in England on the point: *Rex v.*

(a) *Jebb. Res. Cases*, 15.

(b) *Joy on Confessions*, 39.

Thornton (a). In that case, the question assumed the guilt of the prisoner.—[MONAHAN, C. J. The Judges must have assumed, in that case, that there were no threats or intimidation used, and that therefore the evidence was admissible.]—*Rex v. Gilham* (b), *Rex v. Wild* (c), *Regina v. Kerr* (d), are to the same effect.—[O'BRIEN, J. In the last case, the evidence was not objected to. Prisoner's Counsel, in his address to the jury, did complain of the way in which the evidence was obtained.]—The last case on the subject is *Regina v. Cheverton* (e).—[BALL, J., referred to the case of *Rex v. Ellis* (f), before Parke, B., cited in *Arch. P. and E.*, p. 203.]—The foundation of the conflict in the cases is *Regina v. Hughes* (g). In that case, the main ground for rejecting the evidence was, that it was irrelevant; and Doherty, C. J., says:—"This admission of the prisoner Patrick does not go to establish that he was aware of Margaret Maxwell's guilt, at any time during the period she remained in his house; and moreover it is an admission," &c.

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In *Regina v. Doyle* (h), the question was put in a way calculated to entrap the prisoner.—[MONAHAN, C. J. How do you distinguish the words of the question in *Doyle's case* from those used in the present case?]—The question put, namely, "Was it there (in Hutchings's shop) you got them?" was merely a continuation of what the prisoner herself had stated: *Regina v. Devlin* (i) is founded entirely on the two cases I have cited. *Regina v. Toole* (k) is not a decision on the abstract point.

Serjeant *Sullivan* on the same side.

The text-books are nearly all in favor of the admissibility of the evidence: *Tay. Ev.*, sec. 804. The Crown is embarrassed by *Baldry's case* (l). That case rules, according to Lord Campbell

(a) 1 Moo. C. C. 27.

(b) 1 Moo. C. C. 186.

(c) 1 Moo. C. C. 452.

(d) 8 C. & P. 176.

(e) 2 F. & F. 833.

(f) Ry. & Moo. 432.

(g) 1 Cr. & Dix. Cir. C. 13.

(h) 1 Cr. & Dix. Cir. C. 396.

(i) 2 Cr. & Dix. Cir. C. 151.

(k) 7 Cox. C. C. 244.

(l) *Ubi supra*.

H. T. 1864. (p. 441), that you cannot interrogate a prisoner.—[MONAHAN, C. J. *Crim. Appeal.* That observation was probably in answer to a reference to the case in *4th Cox (Regina v. Pettit (a).)*—It is not open to Lord Campbell

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JOHNSTON. to rule that there can be no interrogation of a prisoner : see *Regina v. Berriman (b).*—[The LORD CHIEF JUSTICE. That refers to the case of a suspected person only, and has nothing to do with the case of a person under arrest. There had been no real arrest here. The constable had not told the prisoner that she was under arrest.—The LORD CHIEF BARON. It may be a proper thing to make inquiries from a person suspected of a crime, in order to ascertain whether there are reasons for taking him into custody ; but it is a different thing to put questions to him tending to prove his guilt, after he has been arrested.]—I would suggest that, though the custom of interrogating prisoners may be liable to abuse, and though it has been condemned by various Judges (who however have invariably admitted the evidence), yet that the rule of law is, that if there has been no threat or inducement by the interrogator, the evidence is admissible, although it has been elicited by interrogation. In *Baldry's case (c)* the words used were, that what the prisoner said “would be used against him at his trial ;” and the Court took the distinction that, if the words had been “may be used,” it would have been right. In the present case, the words are not nearly so strong ; and the question merely was, “What have you got in the parcel ?” If the answer to this be admissible, the rest must be so.—[The LORD CHIEF JUSTICE. What occurs to me, on the principle of the case, is this :—If a Judge comes to decide that a confession is admissible in evidence, must he decide that it was a purely voluntary confession ? The law of England, since the time of Judge Jeffreys, is against any kind of extraction of evidence from a prisoner, not only by torture, but by anything that could be calculated to excite the prisoner to confess. Any answer given under such circumstances is not admissible. Now, what the Legislature has done is this :—By the statute 14 & 15 Vic., c. 93, a Magistrate before whom a prisoner is brought is only

(a) 4 Cox. 164.

(b) 6 Cox, C. C. 389.

(c) *Ubi supra.*

at liberty to ask him one question, namely, "Whether he desires to say anything?" and even this question is not to be asked without a previous caution being given to the prisoner, namely, that whatever he does say will be taken down in writing, and may be used against him at his trial. When the Legislature has laid down this as the rule for us to steer by, when the Judges differ as to the circumstances to which they will apply the rule, ought not we to say that the law of England does not allow evidence to be obtained by questioning a prisoner, except in the particular way prescribed by the statute.—O'BRIEN, J., called attention to the case in 6 *Cox, Regina v. Berriman*.]—That case was decided solely on the particular facts of it. The question was an exceedingly improper one, namely, "Where did you put the body of your child?"—[MONAHAN, C. J. Is not the meaning of the question in the present case "Did not you steal the shoes?"]—In the case of *Rex v. Ellis (a)*, evidence of this kind was received. The answer was given to a question put by a Magistrate to the prisoner, after he had refused the prisoner the assistance of an attorney.—[THE LORD CHIEF BARON. There appears to have been a new current of opinion setting in after the passing of the 14 & 15 Vic.—THE LORD CHIEF JUSTICE. If we are put to choose between two rules of law, I think the Legislature has given us the true rule.]—The text-books are all in our favor.

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Molloy, in reply.

The interrogation of a prisoner, for the purpose of eliciting evidence to sustain the prosecution, is foreign to the spirit of our law. "By the law of England," said Lord Campbell, in *Baldry's case*, "prisoners cannot be interrogated." Serjeant *Sullivan* says that this is a mere interlocutory remark; but that is not so. It is the expression of Lord Campbell's well-considered opinion, endorsing a previous decision of Chief Justice Wilde, in *Regina v. Pettit*; where the latter refused to allow the prisoner's answer to the police-constable's question to be given in evidence, and censured the practice of questioning prisoners. When Baldry's Counsel, in his

(a) Ry. & Moo. 432.

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argument, referred to this, Lord Campbell interrupts him, to express his approval of Chief Justice Wilde's decision, saying, "Yes, by the law of England, prisoners cannot be interrogated." The examination of the prisoner, which it is the duty of every Magistrate to take before committing a prisoner or sending a case for trial, is not the prosecutor's right; it is the prisoner's privilege—a favor conferred by the law upon the prisoner, for his benefit, that, if innocent, he may, upon such examination, clear himself, and so regain his liberty. It is so laid down 1 *Chitty's Criminal Law*, p. 84. This examination was not allowed the prisoner at Common Law. It was first granted in cases of felony, by the 2 *Philip and Mary*, c. 10; and afterwards extended to misdemeanors, by the 9 *G. 4*, c. 54. The 14 & 15 *Vic.*, c. 93, regulates the mode in which this examination is to be taken, and prescribes the question which the Justice is to ask the prisoner. It does not give him authority to ask any question he pleases. And accordingly, in *Berriman's case*, when the Magistrate did not rest satisfied with putting the question prescribed by the statute, but went further and asked another question, the present Chief Justice of the Common Pleas in England would not allow the answer to be given in evidence, and said that the question should not have been asked. Is a constable to be permitted to do what a Magistrate will not be suffered to do? If the doctrine contended for by the Crown should be established, then a policeman will be empowered to do what, it must be admitted, neither a Magistrate nor any of the Judges administering the Criminal Law have power to do. It is no part of a policeman's duty to examine prisoners. He should leave that, as the CHIEF BARON has observed in *Bodkin's case*, to the Magistrate, who alone has the power to reduce to writing what the prisoner says. It would be dangerous to admit evidence of this kind, depending, as it must, on the "slippery memory" of the constable, who may not be examined till months, or even years, after the transaction; and then, through professional zeal, may unconsciously give a color and meaning to the prisoner's answers which in reality they do not bear. *Thornton's case*, cited by the Crown, shows the evil results that will follow, and the lengths to

which the police will proceed, if this class of evidence is admitted. Thornton was made to undergo a species of torture. He was a little boy of fourteen years old. The police-officer arrested him, and, instead of taking him before the Magistrates, who were then sitting, he sent him to the police-office, kept him there for some time, took him then to the bridewell, kept him for nearly a day without food, cross-examined, abused, and intimidated the little boy, and by these means extorted an admission from him. This case, and the others cited by the Crown from *Moody* and *Jebb's Crown Cases*, are the authorities relied upon by the Crown. They were decided in the Court for Crown Cases Reserved, before the establishment of the Court of Criminal Appeal. In estimating how far the reports of these cases can be relied upon as authorities, it is important to consider the means which the reporters had of gaining reliable information as to the facts of the case, and the grounds of the decision which they report. In the Court of Criminal Appeal the facts are set forth in the case, transmitted to the Court by the Judge who tried the prisoner, the question is argued by Counsel, and the Judges deliver their judgment in open Court. It was not so in the old Court for Crown Cases Reserved. There the point reserved was considered privately, by the Judges, in the Queen's Bench Chamber; their decision was not given publicly in open Court, but privately communicated to the next going Judge of Assize; so that the reporters had not the means of obtaining accurate information as to the facts of the case, or the grounds of the decision which they report. There must have been something more in these cases than appears in the reports; otherwise it is difficult to account for Judges like Mr. Justice Burton and Chief Justice Bushe overruling, on Circuit, decisions of the Twelve Judges, in which they themselves took part; especially as the opinion of the majority of the Judges upon reserved Crown Cases is binding upon the individual Judges, whatever their own opinion may be: *Jebb's Reserved Cases*, p. 234. Chief Justice Bushe and Justice Burton were two of the Judges by whom *Gibney's case* was decided, yet the former, in *Regina v. Doyle*, and the latter, in *Regina v. Devlin*, refused to allow the

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prisoner's answers to a policeman's questions to be given in evidence. Furthermore, the cases upon which the Crown relies do not appear to have been followed, either in England or in this country. That they were not followed in England, is evident from the remarks of Chief Justice Doherty, in *Regina v. Hughes*, and the decisions in *Pettit's case* and *Berriman's case*; that they were not followed in Ireland, is shown by the several decisions of the eminent Judges referred to by Mr. Curran. *Gibney's case* was not reported till nineteen years after the decision, and the report is not taken from the notes made by Justice Jebb. *Wild's case* and *Gilham's case* are not analogous to the present one. In those cases the questions were not asked by the constable. *Regina v. Cheverton*, the most recent case, is not an authority for the Crown, but rather one for the prisoner. There, Chief Justice Erle rejected admissions elicited from the prisoner by the constable's questions, and stigmatised the practice of questioning prisoners as most improper; and from the *note* in 2 *Foster and Finlayson*, it appears that Cockburn, C. J., expressed a similar opinion during the same Circuit.

Cur. ad vult.

DEASY, B.

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In this case the prisoner was convicted of feloniously stealing boots, at the last Commission, before Judges O'BRIEN and CHRISTIAN. In the course of the trial, certain statements of the prisoner were tendered and received in evidence against her, though objected to by her Counsel. The circumstances are thus stated in the report of the learned Judges who tried the case:—

A police constable, W. Doyle, stated that he and a police inspector, both in plain clothes, followed the prisoner from Kingstown to Dublin, and that at Westland-row station they went up to her, and he, Doyle, told her they belonged to the police, and that she was described as having stolen boots from shops in the city. He also said to her that she was charged as having committed a felony. He asked her what she had in that parcel. He would not, he said, have let her go, but he did not tell her that. He said he did not, before he asked that question, or before she answered it, give her

any caution, or hold out any inducement, and that he told all that was said between him and the prisoner; and that he did not recollect that the inspector said anything. The prisoner's Counsel having objected to the admissibility of the answers given by the prisoner to the questions put by Doyle under the foregoing circumstances, the Judges received them, but reserved for this Court the question of the propriety of their reception.

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It was contended on the part of the prisoner that, as the statements were made in answer to questions put by a police constable, when she was in effect in custody, without any previous caution, they should not have been received in evidence against her; and they have referred us to observations of several very eminent Judges strongly disapproving of evidence of that description. However I may concur in those observations, I have been unable to satisfy myself that there was any legal objection to its admission. The rule of law is, that admissions made by a person accused of a criminal offence are to be received in evidence against him at the trial, provided they appear to be purely voluntary; but if they appear to be produced by the influence of any threat or inducement of a temporal nature, used by a person having authority, they cannot be received, because the Court cannot be satisfied that they are not the result of such threat or inducement, and therefore not purely voluntary.

In *Lamb's case* (a) the rule is thus stated by Grose, J., giving the opinion of the Twelve Judges:—"The general rule respecting this species of testimony is, that a free and voluntary confession, made by a person accused of an offence, is receivable in evidence against him, whether such confession be made at the moment he is apprehended, or while those who have him in custody are conducting him to the Magistrate, or even after he has entered the house of the Magistrate for the purpose of undergoing his examination."

In *Baldry's case* (b) it is thus stated by Lord Campbell, C. J.:—"The rule I take it to be as Mr. Mills has stated, and that if there be any worldly advantage held out, or any harm threatened,

(a) 2 Leach, 154.

(b) 2 Den. 446.

E. T. 1864. "the confession must be excluded. The reason is, not that the law
Crim. Appeal. "supposes that the statement will be false, but that the prisoner
 THE QUEEN "has made the statement under a bias; and that, therefore, it
 v. "would be better not to submit it to the jury. If the matter
 JOHNSTON. "were *res integra*, I should perhaps have doubted whether it
 "might not have been advisable to allow the confession to be
 "given in evidence, and let the jury give what weight to it
 "they pleased; but I do not, in the slightest degree, intend to
 "break in upon the rule laid down by Mr. Mills."

That the rule thus laid down does not operate to exclude statements made by accused persons, in answer to questions put to them, whether by persons in authority or by others, though not preceded by any caution, has been repeatedly decided; and unless those decisions are now to be overruled, we cannot yield to the objection made to the admission of the statements of the prisoner in the present case. Thus in *Gibney's case*, which is reported in *Jebb's Reserved Cases*, p. 15, the prisoner was taken into custody upon a charge of having murdered his child. The constable who was taking him to gaol said he held out no hopes to the prisoner nor used any threat. He said to him, "You must be a very unhappy boy to have murdered your own child, if it be the case." The prisoner was crying very severely, and the constable then said, "Did you kill the child?" in answer to which the prisoner made a full confession. The admissibility of this, and of another confession to another constable being considered, all the Judges being present, it was their unanimous opinion that the confession was properly received. "Some of the Judges," Mr. *Jebb* says, "had doubts, but they finally concurred with the rest. They held the rule to be well established, that a voluntary confession shall be received in evidence; but if hope has been excited, or threats or intimidation held out, it shall not. The fear, however, to be produced must be of a temporal nature; and in this case there was no such threat or intimidation, nor any fear of a temporal nature produced."

In *Thornton's case* (a) a similar decision was come to by the

(a) 1 Moo. C. C. 27.

majority of the English Judges. There, while the prisoner, a boy of fourteen, was in custody upon a charge of arson, the police-officer told him that, in consequence of the falsehoods he had told and the prevarications he had used, there was no doubt he had set the premises on fire, and asked him if any persons had been concerned with him or induced him to do it. The prisoner said he had not done it. The police-officer replied that he would not have told so many falsehoods as he had, if he had not been concerned in it, and again asked him if anybody had induced him to do it. The prisoner began to cry, and made a full confession. The Judge, Bayley, J., thought it deserved consideration, whether a confession so obtained, when the detention of the prisoner was perhaps illegal, and where the conduct of the police-officer was calculated to intimidate, was admissible in evidence; and reserved the point for the consideration of the Judges. The report states that in Trinity Term 1824, the Judges met and considered the case, and seven Judges, among whom was Lord Tenterden, held the confession rightly receivable, on the ground that no threat or promise had been used. Three Judges, Best, C. J., Bayley, J., and Holroyd, J., were of a contrary opinion.

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In *The King v. Wild* (a), the prisoner, a boy under fourteen, was tried and convicted of murder, before Gaselee, J. Part of the evidence against him was a statement made by him to a man who made him kneel down. The witness stated:—"He did kneel down. I then said to him, 'I am going to ask you a very serious question, and I hope you will tell me the truth in the presence of 'the Almighty.' I then said, 'did these children fall into the pit?'" The question of the admissibility of the prisoner's statement in answer to that question having been reserved, it was considered at a meeting at which all the Judges but four were present, in Michaelmas Term 1835; and they were unanimous that the confession was strictly admissible; but they much disapproved of the mode in which it was obtained. There, the statement was made to

(a) 1 Moody, C. C. 452.

E. T. 1864. a person not a constable; but the prisoner was in custody upon the
Crim. Appeal. charge of which he was afterwards convicted.

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 dale, J., of murder, principally upon confessions made by him
 in gaol, which he was induced to make by the exhortations of the
 chaplain of the gaol; and among those confessions was one in
 answer to a question put to him by one of the Mayor's officers.
 The question as to the admissibility of those confessions having
 been reserved, it was argued in Trinity Term 1828, in the pre-
 sence of all the Judges, except Hullack, B. The Judges present
 were unanimously of opinion that the confessions were properly
 received; and the prisoner was afterwards executed. It is said
 that these cases are not binding on us, as the Judges did not sit
 as a Court, and as two of them, viz., *Gibney's case* and *Thornton's*
case, were come to without argument; but, though not binding
 upon us, they are authorities of the greatest weight, and ought
 now to be followed by us, unless counteracted by subsequent
 decisions of equal, or nearly equal, importance. But, so far from
 there being any such subsequent decisions, -I find that admissions
 made in answers to questions put by constables have been repeat-
 edly admitted in evidence against prisoners in England. Thus,
 in *The Queen v. Berriman* (b), where the prisoner was indicted
 for concealing the birth of her child, it appeared that, in conse-
 quence of rumours affecting her character, a police-officer went to
 her, and charged her with having murdered or concealed the
 birth of her child. The result of his questions was, the report
 says, that she made a certain statement, which he declared in
 evidence to the jury. Erle, J., expressed the strongest disappro-
 bation of the course pursued; but he admitted the evidence. He
 says:—"If there is evidence of an offence, a police-officer is jus-
 "tified, after a proper caution, in putting to a suspected person
 "interrogatories, with a view to ascertaining whether or not there
 "are fair and reasonable grounds for apprehending him. Even
 "this course should be sparingly resorted to. But here, there was
 "nothing whatever to show that any crime had been committed.

(a) Moody, C. C. 186.

(b) 6 Cox, 368.

"No finding of any body—no sign of delivery—no marks of blood—
 "not the slightest indication in fact to point to crime; and it is
 "sought, by questioning the prisoner on the subject, to establish
 "from her own lips the crime itself, as well as her guilty con-
 "nection with it."—"I wish it," he says, "to go forth among the
 "inferior officers of justice, that such a practice is entirely opposed
 "to the spirit of our law." Those strong expressions of condem-
 "nation of the course pursued to obtain the evidence show conclu-
 "sively that the eminent Judge who used them did not consider
 that there was any ground upon which he would have been
 justified in rejecting the evidence obtained by it.

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Again, in the case of *The Queen v. Cheverton* (a), tried before the same Judge, admissions obtained by questions put by a policeman were admitted in evidence against the prisoner. There, the prisoner was tried for the murder of her infant child. A policeman named Boxler had said to the prisoner, "You had better tell all about it; it will save trouble;" and had then put questions to her, the answers to which it was proposed to give in evidence. The Counsel objected to the evidence as inadmissible, as having been made under the influence of a threat or inducement by a person in authority. Erle, C. J., so held; and the evidence therefore was rejected. A police-superintendent had afterwards gone to the prisoner, and, without cautioning her, or explaining the object of his inquiries to her, put questions to her, the answers to which it was proposed to give in evidence. The questions were as to the number of her children, and in particular what had become of the youngest, the one mentioned in the indictment, and whether she had been at Colchester on the 4th of July, the place and time of the murder charged in the indictment. The Counsel objected that the statements were inadmissible, because made by the prisoner under the influence of the same inducement, it being all part of the same proceedings on the part of the police. Erle, C. J., consulted Wightman, J., and intimated that his learned brother and himself were of opinion that, though this former statement was inadmissible, there did not appear the same reason for excluding

(a) 2 F. & Fin. 833.

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the second. He would, however, reserve the point if requested. The evidence was admitted; but the prisoner was acquitted. The reporter states, in a note to that case, that the Chief Justice, in charging the grand jury, had observed upon the practice as very improper; and that Cockburn, C. J., during the same Assizes, on the Midland Circuit, expressed a similar censure in a similar case. Now, what constituted the impropriety is the giving in evidence against the prisoner admissions so obtained; so that both those eminent Judges must have been of opinion that the mode of obtaining the admissions did not of itself constitute a ground for refusing to receive them in evidence against the person who made them.

The case of *The Queen v. Baldry* (a) is also a strong authority for the admission of such evidence as that here objected to. There, the prisoner was indicted for administering poison, with intent to murder, and tried before Lord Campbell. A policeman was called for the prosecution, who said:—"I went to the prisoner on the 17th of December; I saw the prisoner; Dr. V—— and another constable were with me. I told him what he was charged with; he made no reply, and sat with his face buried in his handkerchief; I believe he was crying; I said he need not say anything to criminate himself; what he did say would be used as evidence against him." Objection was made on behalf of the prisoner, that what he then said was inadmissible. Lord Campbell received the statement of the prisoner, which amounted to an admission of his guilt. But, as doubts had been entertained whether a confession, after such a caution, might lawfully be given in evidence, he reserved the question for the Court of Criminal Appeal; the prisoner was convicted, and sentenced to death. The case was argued in April 1852, before Lord Campbell, C. J., Pollock, C. B., Park, B., Erle, J., and Williams, J. The argument of the prisoner's Counsel was entirely based upon the words of caution used by the policeman, which he contended amounted to an inducement; but the Court were unanimously of opinion that there was no foundation for the argument, and the confession had been properly

(a) 2 Den. C. C. 430.

received; and the rule was laid down by all the Judges, especially by Erle, J., and Lord Campbell, C. J., that, in the absence of threat or inducement, any statement made by an accused person may be received in evidence against him.

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In *The Queen v. Kerr* (a), the prisoner was indicted for stealing four £5 notes. A policeman, who examined her box, and found two £5 notes in it, asked her where were the other two; and she said she did not take more than two. On his cross-examination, he said he did not caution her that her answer would be given in evidence against her. The evidence was commented on strongly by the prisoner's Counsel; but it was received by Park, J., and the prisoner was convicted.

It is said that it is unreasonable to allow the constable to interrogate the prisoner, while the Magistrate, before whom it is the duty of the constable to bring him, is precluded from doing so; and reliance has been placed upon the 14th section of the 14 & 15 Vic., c. 93, which regulates the manner in which evidence shall be taken in proceedings before Magistrates for indictable offences. But that section merely enables depositions of witnesses, and the written statement of the prisoner, when taken in conformity with its provisions, to be used; and does not otherwise alter the law of England; and it contains the following proviso:—"Nothing herein contained shall prevent the prosecutor from giving in evidence any admission or confession or other statement made at any time by the person arrested, and which would be admissible by law as evidence against such persons." I do not see therefore how that Act can affect the admissibility of statements or admissions of the accused made to a policeman, any more than it can affect those made to any other person. Even where there was no such proviso, it was held, in *Lamb's case* (b), that the analogous Act of *Philip and Mary* did not prevent that being received in evidence against a prisoner which was receivable in evidence before.

If the objection that the statement of the accused were made in answer to questions put by policemen were to prevail, that objection would apply still more strongly to answers made to questions put by a Magistrate, since his authority, and consequently his

(a) 8 C. & P. 179.

(b) 2 Leach, 154.

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influence over the accused, considerably exceeds that of the policeman, yet it has been held, more than once, that answers to questions so put are admissible against the prisoner.

In *Rex v. Ellis* (a), the examination of the prisoner, taken before the committing Magistrate, was offered in evidence. It appeared that part of the evidence was elicited by questions put by the Magistrate, the prisoner having claimed the right of his attorney's attendance and assistance, which the Magistrate refused to permit. No threat or promise was used by the Magistrate. It was objected by Wilde, J., on the authority of *Rex v. Wilson* (b), that an examination so obtained is inadmissible against the prisoner. Little-dale, J.:—"It is stated, in *Starkie's Evidence, Appx.*, part iv, 52, "where the case quoted is also noticed, that Holroyd, J., received "an examination to which there was this objection. I think his "decision the correct one, and that the evidence is upon principle "admissible." Again, in *Rex v. Court* (c), it was proposed to give in evidence the examination of the prisoner before the committing Magistrate. The Magistrate said:—"No inducement was held out "to the prisoner to confess. Mr. N — had said, in the presence "of the prisoner, that he considered the prisoner to be the tool of "G —. I then told the prisoner to be sure to tell the truth. "He then made the statement." It was objected to by the prisoner's Counsel; but Littledale, J., received it, saying:—"The "object of the rule relating to the exclusion of confessions is to "exclude all confessions which may have been procured by the "prisoner being led to suppose that it will be better for him to "admit himself to be guilty of an offence which he never really "committed."

In *The Queen v. Rees* (d) part of the prisoner's statement was made in answer to questions put to him by the Magistrate. It was afterwards read to him, and he said it was correct; and Denman, C. J., received it in evidence. In *The Queen v. Bartlett* (e), on an indictment for murder, the examination of the prisoner before the

(a) Ry. & Moo. 432.

(b) 1 Holt, N. P. C. 597.

(c) 7 Car. & P. 486.

(d) 7 Car. & P. 569.

(e) 7 Car. & P. 832.

Magistrate was objected to, on the ground that it appeared as if some parts of it were in answer to questions put by the Magistrate; but Bolland, B., said it could not be rejected on that ground, and the prisoner was found guilty. It is true that in the case of *The Queen v. Pettit* (a), Wilde, C. J., refused to receive answers to questions put by a Magistrate; and in *The Queen v. Berriman* (b), Erle, J., made a similar ruling. But in *The Queen v. Stripp* (c) it was held by the Court of Criminal Appeal that a voluntary statement of a prisoner, made in the presence of the Magistrate, though not committed to writing pursuant to section 18 of the 11 & 12 Vic., c. 42, which corresponds with section 14 of the Irish Act, was admissible against the prisoner.

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Unless, therefore, a distinction is to be made between a statement made in answer to a question put by a Magistrate, and a statement made to him not in answer to a question, as to which I give no opinion, the rulings of Wilde, C. J., and Erle, J., must be considered as overruled by the decisions of the Court of Criminal Appeal in *Stripp's case*. But even if they are to be considered correct, they do not in any manner conflict with the previous cases in which it was held that statements made in answer to questions put by policemen, if not made under the influence of fear or hope, are admissible in evidence against the person who made them.

The only two cases which are opposed to this view are that of *The Queen v. Margaret Hughes* (d), before Doherty, C. J., and *The Queen v. Devlin* (e), before Burton, J., who is said to have consulted Brady, C. B. But in neither of these were the previous cases referred to, nor are any reasons given; when they were brought under the notice of Crampton, J., in the case of *The Queen v. Francis Hughes* (f), he said:—"He had frequently "had occasion to decide the question, and all these cases had been "before him. The confession of a man, to be admitted, is not to "be extorted by fear nor induced by flattery; but when a person "voluntarily gives it, it may be received, whether the questions be

(a) 4 Cox, 164.

(c) 1 Dear. C. C. 648.

(e) 2 Cr. & Dix. C. C. 152.

(b) 6 Cox, 388.

(d) 1 Cr. & Dix. C. C. 115.

(f) Joy, 39.

E. T. 1864. "put to him by an authorised or unauthorised person; wherever the
Crim. Appeal. "declaration is voluntary he would receive it; and that the doctrine
 THE QUEEN "in *Wild's case* was the true one."
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JOHNSTON. In the case of *The Queen v. Toole* (a), relied on by the prisoner's Counsel, it is true that such evidence was rejected by Pigot, C. B., and Richards, B.; but the reasons given for its rejection are perfectly consistent with the rule as laid down in the cases to which I have referred. Pigot, C. B., says:—"I do not think the abstract question is now before us, or that we are called on to decide it. The view I take of the present point for our decision is this; it is essential that the Judge should be satisfied that the statement of the prisoner has not been the result of some influence acting upon the mind, either of hope or fear. I am not satisfied upon that point, and therefore I reject the evidence." And Richards, B., says:—"The rule is that, if there has been any motive of fear or hope acting on the prisoner, the statement consequent on this statement should not be admitted. Without laying down any abstract rule, it is sufficient to say we do not think this evidence should be admitted." That case therefore is not an authority for the general proposition submitted to us, that any statement made by an accused person, in answer to questions put by a constable, is, upon that ground alone, to be rejected. The fact that the statement was elicited by questions so put, may be an element in leading to the conclusion that it was made under the influence of fear or hope, excited by a person in authority, but we could not decide that it was *per se* sufficient to cause the rejection of the statement, without overruling the numerous cases in which such statements have been received in evidence against prisoners both in England and Ireland.

FITZGERALD, J., HUGHES, B., and FITZGERALD, B., concurred with Baron DEASY.

HAYES, J.

On the afternoon of the 28th November last, two police-constables, in colored or plain clothes, travelled by the train from Kingstown to

(a) 7 Cox, 244.

Dublin. On their arrival at Westland-row, a young woman (the defendant Mary Johnston) also got out of the train, having a small paper parcel in her hand; and between her and one of the policemen (William Doyle), in the presence of the other, the following conversation occurred:—

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Police-constable—"We belong to the police. You have been described to us as having stolen boots from shops in the city. You are charged as having committed felony. What have you in the parcel?"

Mary Johnston—"I have two pairs of boots in the parcel."

Police-constable (taking the parcel from her)—"Where did you get them?"

Mary Johnston—"I was made a present of them in Kingstown."

Police-constable—"I saw you in Mr. Hutchings's shop in Kingstown. Was it there you got them?"

Mary Johnston—"Yes. I took them out of that."

Police-constable—"You are not bound to say anything to criminate yourself. We shall arrest you, and bring you to the police-office."

The question now for our consideration is, whether the last answer given by the defendant, in which she said she had got the boots in Mr. Hutchings's shop, was legally receivable in evidence.

The case has been argued on both sides as of a confession made by one while in the custody of a constable, and in answer to interrogatories addressed to her by him; which, I may say, I by no means think a correct mode of dealing with the case. As the law now stands, confessions, made in the course of criminal proceedings, may be considered under three aspects, according to the stage at which they are made:—

First. The confession may be made in open Court, when the party is called on to plead to the indictment. In all such cases it is usual for the Judge, in mercy to the prisoner, and before directing the plea of guilty to be entered, to examine him, in order to satisfy himself whether the confession is freely and voluntarily made. But, whether he do so or not, I believe it has never been questioned but that the confession, so made and entered of record, does import

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 of such absolute verity that it is allowed by the law to stand in place
 of a conviction by the jury, and to warrant the Court in pronounc-
 ing judgment upon it accordingly.

JOHNSTON. Second. A confession may be made before the committing Ma-
 gistrate, after he has taken the evidence against the prisoner, and
 in obedience to the statute 14 & 15 *Vic.*, c. 93, s. 14, par. 2; and
 this we may call a magisterial confession, as the other may be
 distinguished as a confession of record. That clause of the statute
 is a virtual re-enactment of the 12 & 13 *Vic.*, c. 69, s. 18 (11 & 12
Vic., c. 42, s. 18, *Eng.*), which was a substitution, with great
 amendments, for that portion of the 9 *G.* 4, c. 54, ss. 2 and 3
 (7 *G.* 4, c. 64, ss. 2 and 3, *Eng.*), that relates to the examination
 of accused persons; and which last-mentioned Act was itself a
 substitution for the 10 *Car.* 1, sess. 2, c. 18, ss. 1 and 3 (*Ir.*);
 analogous to the English enactments 1 & 2 *Philip and Mary*, c. 13,
 s. 4, and 2 & 3 *Philip and Mary*, c. 10.

These earlier statutes of *Mary* and of *Charles*, as well as the
 statutes of *G.* 4, simply direct that the Magistrate, before admitting
 to bail, or committing any person charged with felony, shall take
 the examination of the prisoner, and the information of them that
 bring him, of the facts and circumstances thereof; and the same,
 or so much thereof as shall be material to prove the felony, shall be
 put in writing, before they make the bailment; or, in case of com-
 mittal, within two days after the examination; and the same shall
 certify at the next general gaol delivery.

It is unnecessary for us now to discuss what was the real object
 and intention of the Legislature in these enactments: I mean, so
 much as authorises and directs the Magistrate to take the examina-
 tion of the prisoner. Suffice it to say that, in the enactment now
 in force, the Legislature has spoken its purpose with clearness and
 precision. The 14 & 15 *Vic.*, c. 93, s. 14, in substance enacts that,
 when the examination of the witnesses for the prosecution shall
 have been completed in the presence of the prisoner, thus giving
 him a full opportunity for cross-examination, and of knowing the
 precise case made against him, he is then, after a due caution from
 the Magistrate, to be asked whether he has any statement to make;

and that, if so, it will be taken down in writing, and may be given in evidence against him on his trial. This caution is so essential a part of the proceeding, that, if it be omitted, no matter how carefully the Magistrate may in other respects have conducted himself, the confession cannot be received against the prisoner as evidence under the statute.

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As introductory to the third species of confession, it is necessary to call attention to a proviso in the enactment I have last referred to, to the effect that nothing therein contained shall prevent the prosecutor from giving in evidence any admission or confession, or other statement made at any time by the person accused, and which would be admissible by law as evidence against such person. This third species of confession, which, as no better name occurs to me, I may distinguish as a confession *in pais*, is not regulated by any statutory enactments, but is governed wholly by the principles of Common Law, as enunciated in the maxim "*nemo tenetur prodere seipsum*," and by judicial decision in elucidation of that maxim. It may be made as well after arrest as before it; and indeed at any time after the commission of the offence, until the accused has been brought up for trial. There is no statute, or any principle of the Common Law, which requires that, to give effect to such a confession, it ought to be preceded by a caution. It is only in the case of a magisterial confession that a caution is, by Statute Law, made essential. All that the Common Law requires is that the confession *in pais* be voluntary. But that word is to be understood in a wide sense, as requiring not only that the prisoner should have free will and power to speak, or refrain from speaking, as he may think right, but also that his will should not be warped by any unfair, dishonest, or fraudulent practices, to induce a confession.

Upon this principle it is that, in the tenderness of modern times, Judges have uniformly refused to receive in evidence a confession that has been either certainly or probably procured by a promise of good or a threat of evil; by exciting a hope of reward or a fear of temporal punishment other than that which the law has prescribed for the offence charged. So also a confession will be rejected if it appear to have been extracted by the presumed pressure and

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obligation of an oath, or by pestering interrogatories, or if it have been made by the party to rid himself of importunity, or if, by subtle and ensnaring questions, as those which are framed so as to conceal their drift and object, he has been taken at a disadvantage, and thus entrapped into a statement which, if left to himself, and in the full freedom of volition, he would not have made. These are cited merely as instances of the several ways in which a confession may be unfairly and improperly procured, so as to deprive it of the character of being voluntary; but I am not aware of any law which declares, as an abstract proposition, that a confession is undeserving of that character if it has been made in answer to questions fairly put, while the party has been left at full liberty to answer or not, as he may think right.

These principles, as I have said, will apply to the confession *in pais*, whether it has been made by a person at liberty or under arrest; but it is manifest to everyone's experience that, from the moment a person feels himself in custody on a criminal charge, his mental condition undergoes a very remarkable change, and he naturally becomes much more accessible to every influence that addresses itself either to his hopes or fears. It is for the purpose of counteracting these influences, and, as much as possible, preserving the mental freedom of the accused, though his bodily liberty may have been restrained, that the criminal jurisdiction has devised and instituted the practice of requiring constables and other persons having the custody of prisoners, so far as possible, to preface with a caution every communication between them which tends to a confession. But I apprehend that these proceedings are desired to be had recourse to *ex majori cautela*, and the better to insure a voluntary confession, but not as in all cases essential to it. Whether a confession be or be not voluntary, is a question altogether for the Judge to decide, when all the circumstances have been laid before him in evidence; and if he, in the sound exercise of his understanding, be well satisfied that it is the voluntary and unbiassed effusion of the mind of the criminal, though it may not have been preceded by a caution, and though it may have been elicited by questions, he will be bound to receive it in evidence; as otherwise

he would be unwarrantably contracting, if not wholly stopping up, one of the avenues of justice. On the other hand, if he be not so satisfied, the evidence ought to be excluded. All the decisions on this question I regard as pronouncements of judiciary law, for the better guidance of the discretion of the Judge, and for ascertaining some fixed and settled rule by which the administration of criminal justice may be established on principles fixed as well as pure. How then, or where, can we draw any other line than that which is marked out by an arrest, or other demonstration that the party has been made amenable to criminal justice?

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Until the criminal feels himself amenable to justice he ought, I think, to be dealt with as one at full liberty to act and speak as he may think right, whosoever be the person with whom he may come in contact. The rules of evidence, in criminal, as in civil cases, clearly establish that everything which a person freely says or does may be made evidence against him on all relevant occasions: *Bac. Abr., Evidence, L.* It matters nothing whether the statement be made to an associate or to a stranger, or to an officer of the law, whose duty may have urged him diligently to make, and even press, inquiries suggested by suspicious facts and circumstances. It would seem to be an exhibition of morbid sensibility towards criminals, if we were to hold that the falsehoods and equivocations uttered by a person not in custody, but strongly suspected of crime, to a constable interrogating him on the grounds of his suspicion, and all uttered for the deliberate purpose of baffling suspicion and evading detection, but nevertheless tending, with subsequent discoveries, to show not only that he was a thief, but a thorough adept in the practice, were to be a sealed book for the purposes of evidence against him, unless the constable were, by a formal caution given, to instruct the party as to the full extent of his (the constable's) suspicions, and so frustrate all the good effects to be expected from interrogation.

In laying down the rule as I have done, I am not aware that I am violating the principle of any single decision, save the case of *Regina v. Berriman*, of which I shall speak presently; and as I recollect, all the cases that have been cited to us of confessions

E. T. 1864. rejected because not preceded by a caution, are those in which
Crim. Appeal. the party was not only a prisoner, but felt himself to be so.

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JOHNSTON. In the case before us, we are informed that the constable had made up his mind that the young woman should not leave him: he was resolved to make her his prisoner, but he had not done so; and we have no reason to think that she ever for a moment, during the conversation given in evidence, felt herself to be so. But what matters it whether the constable had or had not made up his mind as to his future course of proceeding, if he kept it to himself, and so did not injuriously affect the mind of the accused?

I have referred to *Regina v. Berriman (a)*. There, Mr. Justice Erle, in his address to the jury, lays down the law thus:—"No police-officer has any right, until there is clear proof of a crime having been committed, to put searching questions to a person, for the purpose of eliciting from him whether an offence has been perpetrated or not. If there is evidence of an offence, a police-officer is justified, after a proper caution, in putting to a suspected person interrogatories, with a view to ascertain whether there are fair and reasonable grounds for apprehending him. Even this course should be very sparingly resorted to."

Now, after the best consideration I am able to give to the case cited, I am by no means prepared to accept it as a sound exposition of law. It would lead I think to results very injurious to society, and I think it hardly consistent with the case of *Beckwith v. Philby (b)*. It would seem strange that the constable, acting in discharge of a duty imposed on him by law, should have full power to arrest a person reasonably suspected of crime, though no crime was committed; but would have no right to question the suspected party, though not a prisoner, as to the grounds of suspicion, until he had first satisfied himself that the crime suspected had been really committed.

On the whole of the case now before us, I am of opinion that the statement to the constable—having been made at a time when the party neither was a prisoner, nor felt or supposed herself to be a prisoner, and not appearing to have been obtained by any threat, promise, or other undue or unfair means—was properly receivable in

(a) 6 Cox C. C. 389.

(b) 6 B. & C. 636.

evidence. But, on the other hand, I am of opinion that if the defendant had, at the time of that conversation, felt herself to be in custody on the criminal charge, then her statements, in answer to the questions, would not have been receivable, unless prefaced by a caution. The announcement of the interrogator's character, and of the charge of felony that he said had been made against the defendant, followed up by a series of questions, in which he exhibited an incredulity as to the truth of the statements made by the defendant, when tested by the facts which he showed her were within *his* knowledge as well as *hers*. All this would, I think, have been quite sufficient to make the defendant feel that she was not at full liberty to speak, or refrain from speaking; but that she was bound in some way or other to explain or account for the contrariety between her statement—that she had been made a present of the boots—and the constable's statement, in answer, that he had seen her that day in Mr. Hutchings's shop; thus plainly insinuating that the boots had been taken from that shop; and so lead the Judge, on the trial, to the conclusion that the prisoner's statement was not voluntary.

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O'BRIEN, J.

In this case, which was tried before my Brother CHRISTIAN and myself, at the last December Commission for the county of Dublin, I am of opinion that the conviction should be reversed, on the ground that certain answers of the prisoner to questions put to her by a policeman (and which answers we received in evidence, subject to the opinion of this Court) were not legally admissible. The first point for consideration is whether, when the questions were put, the prisoner was not substantially in custody? It appears to me that, although the crime with which the policeman charged her (that of stealing boots in the city) was not that for which she was tried (namely, stealing boots in Kingstown), yet that, from the course adopted by the policeman, she must have considered herself as being in custody on one charge or the other; and that, accordingly, the question of the admissibility of the evidence is to be

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The next question is one which frequently arises, and is of considerable importance, namely, whether, if questions be put to a prisoner by the constable in whose custody the prisoner is, without any caution whatever (questions which bear materially upon the criminality of the prisoner, and are manifestly put in order to establish his guilt by his answers), whether, I say, the answers to such questions are properly admissible in evidence against the prisoner?—[His Lordship here read the evidence of the policeman.]—It is manifest that the policeman asked those questions for the purpose, not of regulating his conduct, but of eliciting from the prisoner an answer that would establish her guilt; and, accordingly, when the prisoner stated that she had been made a present of the boots in Kingstown, he sought by his next question to elicit a contradiction or retraction of that statement, by telling her that she had been seen in Mr. Hutchings's shop, and asking her was it not there she got them? Having attained his object, he then goes through the mockery of giving her a caution.

The habit of prisoners being interrogated by the civil authorities, with a view to establish their guilt, prevails in other countries. In some, even a prisoner on trial is exposed to a searching examination. That practice is not in accordance with the principles of our Criminal Law. A prisoner, upon his trial upon a plea of not guilty, before any criminal tribunal in this country, from the highest to the lowest, cannot be interrogated as to any matter whatever; and I trust that the practice prevailing in other countries will never be legalised here. Such being the rule by which all our criminal Courts are bound, would it not be strikingly inconsistent to hold that the inferior officers of justice, in their proceedings before the trial, are exempted from it?—that they may do what the highest tribunal could not; and endeavour to secure the prisoner's conviction by eliciting, previously to the trial, answers to questions which could not then be put?

The Legislature, by recent statutes, has indicated the course which should be adopted towards a prisoner before his trial.—[His

Lordship read the 14th section of the Petty Sessions Act (14 & 15 Vic., c. 93), and also referred to the form given in schedule A for the prisoner's statement].—These enactments show that the intention of the Legislature was to give the prisoner an opportunity of making any statement he desired; but not to allow the Magistrate to interrogate him, save by asking him, in general terms, if he desired to say anything in answer to the charge. If, however, the Magistrate went further, and interrogated the prisoner as to his guilt, or as to the facts relied on to establish it—if (as done by the policeman in the present case) the Magistrate, not satisfied with the first answer of the prisoner asserting his innocence, sought to contradict it by further questions, can it be doubted that the Magistrate by so doing would transgress his duty, and that the statement of the prisoner, in answer to such interrogatories, would not be receivable in evidence under the Act?

These enactments were framed for the purpose of providing that the statement of the prisoner should be voluntary, and not extracted by questions; and should not be made until after he was apprised of the effect it might have against him; and also for the purpose of guarding against the inevitable inaccuracies and mistakes that would occur if the proof of the prisoner's statement rested merely on the fallible memory of those who heard it. Would it then be in accordance with the policy of these enactments to hold that, either previous or subsequent to this inquiry under the statute, the prisoner, while in custody, might be interrogated and cross-examined by the Magistrate or policeman in whose custody he was, as to details and circumstances tending to establish his guilt; and that his answers to such questions might be proved against him at the trial, although the questions were put without any caution whatever, and without apprising the prisoner of his being at liberty to answer them or not, as he thought fit? The admission of such evidence would, in my opinion, frustrate the policy of the Act, and render the securities thereby provided with regard to the prisoner's statement of little or no value.

With respect to the proviso at the end of the 14th section, which has been relied on by the Crown Counsel, namely, that nothing

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E. T. 1864. therein "contained should prevent the prosecutor from giving in
Crim. Appeal. "evidence any admission, confession or other statement, made at
 THE QUEEN "any time by the prisoner, which would be admissible by law
 v. "as evidence against him." It appears to me that such proviso
 JOHNSTON. refers to voluntary statements, made by the prisoner of his own
 accord, but not to answers given by him, while in custody, to
 questions put by Magistrates or policemen.

Independent of the inference to be deduced from these provisions of the statute, it appears to me that answers given by a prisoner to questions put to him by those in whose custody he is, respecting the offence with which he is charged, cannot be regarded as voluntary statements, except the prisoner be at the same time apprised that he is not obliged to answer them, and that his answers may be given in evidence against him at his trial. The very fact of these questions being put by such a person, unaccompanied by any such caution, conveys to the prisoner's mind the idea of some obligation on his part to answer them, and deprives the statement of that voluntary character which is essential to its admissibility.

This was the view taken by Chief Baron Richards and Chief Justice Wilde, in two cases, of *Rex v. Wilson (a)* and *Regina v. Pettit (b)*, to which I shall hereafter refer, in which they rejected the evidence of admissions elicited from the prisoner by questions put to him by a Magistrate; Chief Justice Wilde stating, in the case before him, that "A person in custody, or other imprisonment, "questioned by a Magistrate who had power to commit him and "power to release him, might think himself bound to answer, for "fear of being sent to gaol;" and that "the prisoner's mind in such "a case would be likely to be affected by the very influences which "render the statements of accused persons inadmissible."

It is a well established rule that, before a statement made by a prisoner is admissible against him, the Court should be clearly satisfied that such statement was voluntary.

In the case of *The Queen v. Waringham (c)*, Baron Parke, with reference to a confession tendered in evidence, remarked that "It

(a) 1 Holt. N. P. 597.

(b) 4 Cox C. C. 164.

(c) 2 Den. C. C. 447, note.

"did not appear that such confession was not made in consequence of some improper inducement; and that, though the evidence left that fact doubtful, the *onus* lay upon the Crown to prove the negative; that they were bound to satisfy him that the confession was not obtained from the prisoner by improper means; and that, in the case before him, he was not satisfied of that fact." He accordingly rejected the evidence, stating that he did so "because he was not satisfied that it was voluntary;" and the prisoner was acquitted. Although, in that case, the confession was objected to in consequence of an inducement having been held out, these observations of Baron Parke appear applicable to all cases where, upon any other ground, the confession is not to be regarded as having been voluntary.

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In another case, of *The Queen v. Moore (a)*, Baron Parke also refers to the ground upon which confessions should be admitted in evidence. If we apply these principles to the case now before us, can we say that the prisoner did not answer the questions because she feared that, if she did not do so, the policeman would take her to gaol? Is it not, on the contrary, clear that the course of proceeding adopted by the policeman was reasonably calculated to produce that impresson on her mind? It may be said that, whatever be the motive which induces a prisoner to answer questions, or make a statement, it is not to be supposed that he would give an untrue answer to his own prejudice, or would falsely criminate himself; but, as to this, I would refer to the observations of Lord Campbell, in *Baldrey's case (b)*, where he states his opinion, "That the rule excluding confessions made in consequence of inducements held out, did not proceed upon the presumption that the confession was untrue, but rather that it would be dangerous to receive such evidence; and that, for the due administration of justice, it was better that it should be withdrawn from the consideration of the jury."

I shall now refer to some of the cases relied on in the argument, in which the question of the admissibility of such evidence arose; and I shall commence with some decided in this country. In

(a) 2 Den. C. C. 327.

(b) 2 Den. C. C. 242.

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The Queen v. Margaret and Patrick Hughes, 1839 (a), it appeared that a statement of the prisoner (which was however consistent with his innocence) had been elicited from him ; and Chief Justice Doherty expressed, in strong terms, his disapprobation of the system of questioning prisoners.. He referred to the cautions given by Magistrates in receiving a prisoner's statement, which were seldom given by persons of an inferior class. He also mentioned a case in which he himself had observed upon the impropriety of a police-officer interrogating a prisoner ; and another case in England, in which he had heard similar opinions expressed by the presiding Judges ; and he concluded by stating that, in future, he never would permit admissions obtained from prisoners in such a manner as had been done in the case before him to be given in evidence.

Again, in the case of *The Queen v. Doyle*, March 1840 (b), Chief Justice Bushe held that the prisoner's answer to a question put to her by a policeman, while she was in custody, was not admissible in evidence, although the policeman had previously cautioned her against saying anything that would criminate her.

In another case, of *Regina v. Devlin* (c), before Burton, J., the prisoner was tried for having in his possession copies of passwords of the Ribbon Society ; and while the prisoner was in custody, a policeman showed him the above papers, and asked him "whether or not he knew anything about them ?" (a question, I may observe, far less objectionable than some of those put in this case) ; the prisoner's Counsel objected to the prisoner's answer being given in evidence, and relied on the two cases I have already mentioned before Chief Justice Doherty and Chief Justice Bushe. Counsel for the Crown disputed the authority of these two decisions, on the same grounds as were relied on by the Crown Counsel in the present case ; but Mr. Justice Burton, after conferring with Chief Baron Brady, stated their joint opinion that the prisoner's answer should not be received in evidence ; and the prisoner was acquitted.

(a) 1 C. & Dix, C. C., 13.

(b) 1 C. & Dix, C. C., 396.

(c) 2 C. & Dix, C. C., 151.

Again, in the two recent cases of *Regina v. Gray* (a), before the present LORD CHIEF JUSTICE, and *Regina v. Bodkin* (b), before the present LORD CHIEF BARON, it was held that answers given by a prisoner in custody, to questions put to him by a constable (though the constable had given the prisoner a previous caution), were not admissible in evidence; the CHIEF BARON stating in the case before him that, where a constable arrested a prisoner, he should not put such questions to him.

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It is well known that Mr. Justice Perrin frequently rejected, on similar grounds, evidence of such statements by prisoners.

We have thus a series of successive decisions in this country, during the last twenty-five years, in which such evidence has been rejected (although in some of them the prisoner, before being questioned, had been cautioned in the usual manner), and there is no reported decision to the contrary by any of the Irish Judges during that period, with the exception of the late Mr. Justice Crampton, who expressed his opinion of its admissibility, in the case of *The Queen v. Hughes*, mentioned in Mr. Joy's *Treatise on Confessions*, pp. 39 and 40.

Before observing upon *Gibney's case* (c), which was so much relied on for the Crown, I shall refer to some of the cases decided in England on this question.

In *Rex v. Wilson* (d), already mentioned, it appeared that a Magistrate had examined the prisoner at length, as a witness, but had not sworn him, or held out any inducement or threat. Chief Baron Richards however rejected the evidence of the prisoner's examination, stating:—"No matter whether the prisoner be sworn or not, *an examination, of itself, imposes an obligation to speak the truth*. If a prisoner will confess, let him do so voluntarily. Ask him what he has to say. But it is irregular in a Magistrate to examine a prisoner in the same manner as a witness is examined. I must reject this evidence." The prisoner was acquitted.

It appears to me that the ground upon which Chief Baron

(a) Levinge on Justice of the Peace, p. 36; 7 Cox. C. C., 246 n.

(b) 8 Ir. Jur., N. S., 340.

(c) Jebb's Reserved Cases, 15.

(d) 1 Holt N. P. 597.

E. T. 1864. Richards rejected this evidence, namely, that the very fact of the prisoner being examined imposed upon him an obligation to speak the truth, is equally applicable to the case of a prisoner being examined by a policeman; and the more so in the present case, in which the mode of questioning was such as would be adopted on cross-examination of an adverse witness.

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It is true that the authority of *Rex v. Wilson* was denied by Mr. Justice Littledale, in a subsequent case, of *The King v. Ellis (a)*, where it appeared that part of the prisoner's examination had been elicited by questions put by the Magistrate. Chief Baron Richards's decision was relied on by the prisoner's Counsel, against the reception of such examination in evidence; but, on reference to a statement in *Starkie on Evidence* (p. 29, *note*, vol. 2 of ed. 1833), that Mr. Justice Holroyd had, in a case before him, received an examination to which there was a similar objection, Mr. Justice Littledale expressed his opinion that Mr. Justice Holroyd's decision was the correct one, and that the evidence was, upon principle, admissible. It appeared further however that the Magistrate had refused to allow the prisoner professional assistance; and upon that ground Mr. Justice Littledale suggested that the case should not be further pressed; whereupon the prosecution was abandoned, and the prisoner acquitted.

Though the previous decision of Richards, C. B., was disapproved of by Mr. Justice Littledale, it should not, I think, be considered as overruled by the case before him, as the evidence was virtually rejected, though upon another ground. It is also to be observed that the case before Mr. Justice Holroyd, upon which Mr. Justice Littledale relied, is mentioned only in Mr. *Starkie's note*, where the facts are not given; nor does it appear that the decision of Richards, C. B., was cited before him.

But the principle which Chief Baron Richards laid down in *Rex v. Wilson* was stated in stronger terms by Wilde, C. J., in the case already mentioned, of *Regina v. Pettit (b)*. In that case it was proposed by the Crown to give evidence of questions put to the prisoner by the Magistrates before whom he was brought, and

(a) Ryan & M. 432.

(b) 4 Cox C. C. 164.

of his answers to them ; which was objected to by prisoner's Counsel. The Crown Counsel relied on the provisions of the 11 & 12 Vic., c. 42, s. 18 (similar to the concluding proviso in the 14th section of the Irish Act, 14 & 15 Vic., c. 93, which has been relied on in this case), and they contended that the statement of a prisoner, whether to an ordinary witness, or policeman, or Magistrate, should not be excluded on the mere ground of its having been elicited by questions. Chief Justice Wilde however stated :—" I think I ought not to receive this evidence, and I reject it ; on the ground that Magistrates have no right to put questions to a prisoner with reference to any matters having a bearing on the charge upon which he is brought before them. The law is so extremely cautious in guarding against anything like torture, that it extends a similar principle to every case where a man is not a free agent in meeting an inquiry. If this sort of examination be admitted in evidence, it is hard to say where it might stop. A person in custody, or in other imprisonment, questioned by a Magistrate, who has power to commit him and power to release him, might think himself bound to answer, for fear of being sent to gaol. The mind, in such a case, would be likely to be affected by the very influences which render the statements of accused persons inadmissible."

The evidence was accordingly rejected, and the prisoner acquitted.

These observations of Chief Justice Wilde, and the rule so expressly laid down by him, are, in my opinion, equally applicable to the present case, where the questions were put by the policeman in whose custody the prisoner was, and who had the power of bringing her to gaol or letting her go free. If answers given by a prisoner, when questions are put by a Magistrate, be not admissible in evidence, I can see no reason why they should be so when the questions are put by a policeman. It was truly stated by Chief Justice Doherty, that the system of a prisoner being questioned by a policeman is even more objectionable than if questioned by a Magistrate, whose higher position and responsibility afford a better security against the abuse of the system. It has indeed been

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E. T. 1864. suggested that answers given by prisoners to questions put by
Crim. Appeal. Magistrates are rejected, because Magistrates are regarded "*as*
 THE QUEEN *persons in authority.*" But it appears to me that, in reference to
 v. JOHNSTON. the question now before us, a policeman in whose custody the
 prisoner is should also be regarded as "a person in authority." A
 confession, made in consequence of a threat or inducement held
 out by such policeman, is equally inadmissible in evidence as if
 such threat or inducement was held out by a Magistrate; because
 in both cases it is considered that the threat or inducement is used
 by "*a person in authority.*" Why therefore should it be held that
 the objection to the admissibility of a prisoner's answers to questions
 put by a Magistrate, on the ground that he is "*a person in autho-*
rity," does not equally apply to the case where such questions are
 put by the policeman?

It will be also observed that Chief Justice Wilde made that
 decision notwithstanding the reliance of the Crown Counsel on the
 proviso in the 11 & 12 *Vic.*, c. 42, s. 18, similar to the proviso
 already mentioned at the end of section 14 of the Irish Act, 14
 and 15 *Vic.*, c. 93.

That case, before Chief Justice Wilde, was probably the one
 referred to (though not by name) in the argument of prisoner's
 Counsel in *Baldry's case* (a), as a decision that a statement by a
 prisoner, in answer to questions, was not admissible in evidence;
 when Lord Campbell stated, as a general rule:—"Prisoners are
 "not to be interrogated. By the law of Scotland, they may be;
 "but, by the law of England, they cannot."

We have next the case of *Regina v. Berriman* (b), before the
 present Chief Justice Erle. In that case a statement of the prisoner,
 in answer to questions put by a policeman, was given in evidence,
 without, as it appears, any objection by prisoner's Counsel (probably
 because the statement was not material), but Chief Justice Erle, in that
 stage of the case, strongly expressed his disapproval of the practice of
 policemen questioning a prisoner. He stated:—"I very much dis-
 "approve of this proceeding. By the law of this country, no person
 "ought to be made to criminate himself, and no police-officer has

(a) 2 Den. C. C. 441.

(b) 6 Cox C. C. 388.

"any right, until there is clear proof of a crime having been committed, to put searching questions to a person for the purpose of eliciting from him whether an offence has been perpetrated or not. If there is evidence of an offence, a police-officer is justified, after a proper caution, in putting to a suspected person interrogatories, with a view of ascertaining whether or not there are fair and reasonable grounds for apprehending him. Even this course should be very sparingly resorted to." Again he says, in reference to what had been done in that case:—"I wish it to go forth amongst those who are inferior officers in the administration of justice, that such a practice is entirely opposed to the spirit of our law."

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In a subsequent part of the trial before Chief Justice Erle, the question as to the admissibility of such evidence was expressly raised. The prisoner was indicted for the murder of her child, and after she had been duly cautioned, and had stated that she had nothing to say, the Magistrate, before committing her, asked her—"Where she had put the body of the child?" Prisoner's Counsel objected to her answer being received in evidence. The prosecuting Counsel contended that it was admissible, as the Magistrate had not at the time committed her for trial, and the questions might have been put with a view to guide him in the exercise of his discretion as to committing her or not. Erle, J., however said:—"I shall certainly refuse to allow any such evidence to be given. The question ought never to have been put, and it would be very unfair towards the prisoner to receive in evidence answers so irregularly elicited."

Counsel for the prosecution then proposed to ask a witness whether, in consequence of the answer which the prisoner had given to the Magistrate, he had made a search and found anything, but Erle, J., refused, saying:—"No; not in consequence of what she said. You may ask what search was made, and what was found; but, under the circumstances, I cannot allow that proceeding to be connected with the prisoner." The result of the rejection of the evidence was the acquittal of the prisoner. In these observations Chief Justice Erle clearly defines the objects for which alone policemen should examine or interrogate suspected

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parties; the limits within which such examination should be confined, and the manner in which it should be conducted; and I have referred to them in detail for the purpose of meeting an argument much pressed upon us by the Crown Counsel, namely, that in most cases it was absolutely necessary that Magistrates and policemen, with a view to the proper discharge of their duties, should interrogate suspected parties.

It appears to me that the questions put in the present case are not in accordance with the rule laid down by Chief Justice Erle, or within the limits which he prescribed.

We have then, on these several Irish and English cases, express decisions that statements of a prisoner, made under circumstances substantially the same as those in the present case, are not admissible in evidence. These decisions were made by eminent Judges, experienced in criminal law, and of whom it certainly could not be said, as in the case referred to by the Crown Counsel, that "they were disposed to sacrifice justice or common sense on the shrine of mercy or of guilt." It is true that these several decisions were the rulings of single Judges, but they are not on that account to be disregarded. In some, the reasons are fully and carefully stated. In almost all, the evidence offered was essential to the case for the prosecution, and in consequence of its rejection the several prisoners were acquitted; which shows that the several Judges must have been clearly satisfied that the evidence was not admissible; as, if they considered it doubtful, they would not, by rejecting the evidence, have made a ruling from which there could be no appeal; but would, as of course, have received the evidence, and reserved the point for the consideration of the Judges, or of the Court of Criminal Appeal, which latter Court had been established some years before the cases decided by Chief Justice Erle, and Chief Justice Wilde, by my Lord Chief Justice, and Chief Baron Pigot.

It has been also urged by the Crown Counsel, during the argument, that in several of those cases the rejection of the evidence may be accounted for by the circumstance that the questions put to the prisoner assumed his guilt. Even supposing that to be material, it may be said that the question put in this case by the

policeman about Mr. Hutchings's shop was of that character ; but it does not appear that in any of those cases that circumstance was made a ground of the decision ; and it appears to me that, supposing the question put to bear upon and be so connected with the charge against the prisoner, that an answer to it in one way would tend to establish his guilt, it is immaterial, so far as the admissibility of the evidence is concerned, whether the question does or does not in its form assume the fact of such guilt. It would be a most embarrassing rule, easily evaded and incapable of being applied with any certainty in the great majority of cases, to hold that the admissibility of the evidence depended upon the form of the question, whether it assumed the prisoners guilt, or assumed the answer to it ; whether it was leading or otherwise ; or such as could only be put upon cross-examination. In many cases this rule might be altogether evaded by altering the form of the question, and yet putting it in such a manner as to produce the same answer from the prisoner.

I shall now refer to the cases relied on by the Crown in opposition to this current of authorities. The principal cases are *Gibney's case* (a) ; and *Rex v. Thornton* (b), and *Rex v. Wild* (c), in 1824 and 1835. As to these three cases, it is to be observed that none of them was argued by Counsel, and that it does not appear that in any of them the Judges considered or at all referred to the question now before us, namely, whether a prisoner's statement was inadmissible in evidence upon the particular ground that it was made in answer to questions bearing upon the offence, and put to him by the policeman or party in whose custody he was.

It is true that in *Gibney's* and *Thornton's cases* the prisoners' statements were made in answer to such questions, so that the facts of those cases admitted of that point being raised ; but the point was not referred to either in the reservation of the Judges who tried the cases, or in the reasons given by the Judges for their decisions. Thus in *Gibney's case*, before the Judges of Ireland (the facts of which have been already stated), the terms of the question reserved were, whether the confession did not result from the prisoner's mind having been excited to terror by the persons by whom he was con-

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(a) Jebb's C. C. 15.

(b) 1 Moody C. C. 27.

(c) Moody C. C. 452.

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ducted to gaol; and therefore whether it was such a voluntary confession as ought to be given in evidence against him; and the decision of the Judges was that, in order to render a confession inadmissible on the ground of its being produced by fear, the fear must be of a temporal nature; and that in the case before them there was no such fear, nor was any threat or intimidation used. Though the conviction was affirmed, the prisoner was not executed.

In that case also it appeared that, in making the confession, the prisoner stated "he was willing to die, and hoped that God would have mercy on him;" and also stated "that his conscience would not let him conceal it any longer."

The question therefore, which the Judges considered was, whether the prisoner's confession resulted from fear of a temporal nature, produced by the acts and speeches of the persons who surrounded him, or from terror as to what would be the consequences of his crime in the other world. The point now before us was not referred to; if it had been raised, it might have been considered that the objection on the ground of the statement having been elicited by questions was removed by the subsequent explicit statement of the prisoner himself, that the motives which induced his confession were the dictates of his own conscience, and the apprehension of a future state. But, as the case stands, I do not think it can be regarded as a decision on the question now before us. It is also to be observed that two of the Judges who decided that case were Chief Justice Bushe and Mr. Justice Burton, who, notwithstanding that case, rejected such evidence in the two subsequent cases already referred to from 1 & 2 *Cr. & Dix.*, C. C. It is therefore to be presumed that they did not consider that the point in question had been ruled in *Gibney's case*. If they had, their decisions would have been otherwise; and this confirms the supposition that the question had not been at all considered in it. It may be that, when *Gibney's case* was decided, the practise of a policeman interrogating a prisoner had not prevailed to such an extent as to direct the attention of the Judges to the question whether the statements made by the prisoner in reply were not, on that ground, inadmissible in evidence.

Again, in *Thornton's case* (a), the terms of the question reserved were, whether a confession obtained when the detention of the prisoner was *perhaps illegal*, and when the conduct of the officer was calculated to intimidate, was admissible in evidence.—[The learned Judge stated the facts of this case from the report.]—And the ruling of the majority (three eminent Judges, Best, C. J., Bayley, J., and Holroyd, J., dissenting) was, that the confession was rightly received, on the ground that no threat or promise had been used. It appears therefore that the only point reserved for the Judges, or decided by them in *Thornton's case*, was as to the effect of the illegality of the custody, and as to the existence of intimidation on the part of the officer; and that (as I have already observed respecting *Gibney's case*) the question now before us was not referred to or answered.

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It may, I think, be stated as a general rule, that when a particular question or ground of objection is not referred to, either in the judgment or argument of any case (though the facts admitted of its being raised), then the decision in the case is not to be regarded as a *decision* on that particular point, especially if the case was not argued by Counsel; though, if that case was not encountered by other authorities, it may be relied on as showing that the objection was not considered valid.

With respect to *Rex v. Wild* (b), it appears that the question was reserved generally, namely, "whether the confession was admissible in evidence?" and the opinion of the Judges was equally general, namely, that the confession was admissible; and it does not appear from the report what the ground of such opinion was. It is also to be observed, that neither of the persons who put the questions to the prisoner in that case was a constable; and that though one of them, Mr. Wragg, was the person who had taken the prisoner into custody, yet that the answer to his question did not criminate the prisoner, and was, in fact, only a refusal by the prisoner to make any statement whatever. The questions in answer to which the prisoner made statements that tended to prove his guilt were put by two other persons (W. Clarke and the innkeeper's

(a) 1 Moody C. C. 27.

(b) 1 Moody C. C. 452.

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son), and it does not clearly appear that Wragg, who arrested him, was present at any such questions. With respect to the confession to the innkeeper's son, he proved that the prisoner, without any promise or threat held out, or question asked by the witness, stated "*that he would tell* witness all about the matter, and that he did not exactly mean to drown the children;" thus voluntarily admitting that he had done so. That case also was not argued by Counsel; and having regard to the peculiar circumstances of it, and to the fact that the reasons of the Judges are not given, the decision in it cannot, I think, be regarded as a decision on the point now in question. In that case also the Judges expressed their disapprobation of the mode in which the confessions had been obtained, and the prisoners's sentence was commuted from death to transportation.

The case of *Regina v. Kerr* (a) has been relied on for the Crown, as if it were an authority for the admissibility of such evidence. Upon referring to it however, it will be found that there was no such decision in the case. The prisoner's Counsel did not object to the admissibility of the confession in evidence; but, in his address to the jury, commented strongly upon the impropriety of the policeman questioning the prisoner without a caution: and the observations of Mr. Justice Allen Park, in his charge to the jury, were merely to the effect that he thought it better that such a practice should not be adopted, though it did not appear to him that there was any impropriety in the policeman's conduct.

The case of *Rex v. Bartlett* (b), before Baron Bolland, has also been relied on, but will be found upon examination not to affect the present question. In that case, the evidence of the prisoner's examination was objected to, on the alleged ground that parts of it were in answer to questions put by the Magistrate; but the Magistrate, who was examined at the trial, stated he had no recollection of having put any questions; and that, if he had, he certainly put none except for the purpose of explaining what had been already said by the prisoner. The point now before us did not

(a) 8 C. & P. 176.

(b) 7 C. & P. 832.

therefore arise in that case; and the decision of Baron Bolland was merely in these words—"The examination must be read." E. T. 1864. *Crim. Appeal.*

Another case relied on for the Crown is that of *Rex v. Court* (a), *THE QUEEN v. JOHNSTON*, where the evidence of the prisoner's examination before a Magistrate was objected to, not on the ground of its having been elicited by questions, but because the Magistrate (after the prosecutor had made a statement in prisoner's presence) told the prisoner "to be sure to tell the truth;" which prisoner's Counsel contended was an intimation to him that it would be better to confess the charge. Littledale, J., merely decided that what the Magistrate said was no inducement; and that therefore the evidence was receivable. That case therefore is also no authority on the present.

The question however appears to have arisen in *Rex v. Rees* (b), where Lord Denman admitted in evidence the prisoner's statement before the Magistrate, though part of it was in answer to questions put by the Magistrate. But in that case it appears that the statement was taken under the provisions of the English Act (7 G. 4, c. 64), as it was received in evidence without the Magistrate or his clerk having been examined. It may therefore be presumed that any questions put by the Magistrate were preceded by a proper caution; and, as the report does not state what the questions were, it might be that they were of the same character as in the case of *Rex v. Bartlett*, above referred to, namely, to explain what the prisoner had already said. Much would of course depend on the nature of the questions; as there are cases, such as those referred to by Erle, J., in *Rex v. Berriman* (c), in which questions of a certain character may be unobjectionable.

In *Baldry's case* (d), which was also relied on, no question appears to have been put to the prisoner; and the objection taken to the admissibility of the prisoner's statement was, that the words of the caution given by the policeman were, that what the prisoner said "*would*" be used "against him," instead of the words "*might*" be used "against him."

(a) 7 C. & P. 486.

(b) 7 C. & P. 568.

(c) 6 Cox, C. C. 388.

(d) 2 Den. C. C. 430.

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In *Rex v. Cheverton* (a), to which we have been also referred, the prisoner was indicted for infanticide. A policeman had said to the prisoner "You had better tell all about it; it will save trouble." He then put questions to her; and the evidence of her statement made in answer to such questions was objected to, on the ground that it was made under a threat or inducement by a person in authority. Erle, C. J., rejected the evidence. Another policeman afterwards went to the prisoner. She said, when she saw him, "Ah! I expected you." He then put various questions, bearing materially upon the charge against her; and the admissibility in evidence of her statement in answer to those questions was objected to, on the ground that she made it under the influence of the same inducement as was held out by the other policeman. Chief Justice Erle, having consulted Justice Wightman, stated their opinion that, though the former statement was inadmissible, there did not appear the same reason for excluding the second. He stated, however, that he would reserve the point. This was not done, as the prisoner was acquitted; but the fact of his having agreed to reserve the question showed that he considered it a doubtful one. It appears also that, without the prisoner's statement, there was not sufficient evidence to sustain the prosecution. I think therefore that, under these circumstances, his reception of the evidence, on the terms of the question being reserved, should not be regarded as a decision that it was legally admissible; and the observations made by him in his charge to the jury show the inclination of his own opinion on the subject, as already expressed by him in *Regina v. Berriman* (b). He told the jury that, for the policeman to put such questions without a caution was most improper, especially since the prisoner did not seem to have been aware of their drift or object. It appears further, from the *note* in 2 *Foster & Finlayson*, p. 834, that, in charging the grand jury, he had observed upon the proceeding as very improper; and that Cockburn, C. J., during the same Assizes, on another Circuit, expressed a similar opinion, in a similar case.

The general result of the authorities therefore appears to be

(a) 2 F. & F. 833.

(b) 6 Cox, C. C. 388.

that, in Ireland, *wherever the objection was raised at the trial*, the evidence was invariably rejected, except in the case already referred to before the late Mr. Justice Crampton; and the only other Irish decision relied on in support of its reception is *Gibney's case*, on which I have already observed.

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With respect to the English authorities, I have also stated my opinion as to the two cases cited from *Moody's Reports*, in which the question was not raised. As to the other English cases in which the objection was made at the trial, there certainly appears to be a conflict of authority on the question; but in my opinion the preponderance of authority is against the reception of the evidence. It is also to be observed that even the Judges who have received such statements in evidence, almost invariably expressed their strong disapproval of the system of questioning prisoners; and Mr. Justice Patteson, in a case mentioned in *Roscoe's Criminal Evidence* (6th ed., p. 48) threatened to have a constable, who had been in the habit of interrogating prisoners in his custody, dismissed from his office. Such being the opinion of the Judges, would it not be inconsistent to hold that the evidence might be used for the conviction of the prisoner, while at the same time the manner in which the evidence is procured, and the parties who give it, are so strongly condemned?

There are many cases in which the system of questioning prisoners by policemen leads to the discovery of other evidence, and is perhaps necessary for the purpose of guiding the police in their subsequent inquiries, and of ensuring the detection of guilt. At present, the police may fairly be deterred from adopting that system by the apprehension of the censure to which they would subsequently be exposed, when the answers to such questions should be given in evidence at the trial. It would in my opinion be far better, for the administration of justice, to hold that the police should be at liberty, without the risk of censure, to question a prisoner, so far as might be fit and requisite for the guidance of their own conduct, and for the discovery of other evidence; but that the answers to such questions should not be given in evidence against the prisoner on his trial.

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On these several grounds, I am of opinion that the evidence in question was improperly received at the trial, and that, accordingly, the conviction should be reversed.

KEOGH, J., concurred with Baron DEASY, that the conviction should be affirmed.

BALL, J.

The principle which I consider has been established by the English authorities, as well as by some of the Irish decisions, amounts to this, that statements made by a prisoner in answer to questions put to him by a police-constable, *without any previous caution*, are admissible in evidence against him on his trial, provided there has been no threat or inducement held out calculated to influence him to make the statement. For this I refer, in the first instance, to *Thornton's case (a)*, which was ruled so far back as 1824. It was there decided, by seven of the Judges of England, including Lord Tenterden, against three others, that admissions made by a prisoner (being, in that instance, a boy only fourteen years of age, and who had been kept without food during a great part of the day), in answer to questions put to him by a constable *without any previous caution*, were admissible in evidence against him on his trial, on the specific ground that no promise or threat had been held out to him calculated to induce him to make the admissions. It appears also that the three dissentient Judges, who held that the evidence ought not to have been admitted in that case against the prisoner, did so, not because it had been elicited by questions put by the constable, but because they considered that the conduct of the constable in the transaction had been calculated to intimidate the prisoner.

I refer next to *Gibney's case (b)*, decided in 1822, when all the Judges of Ireland held unanimously that a confession made by a prisoner, which had been elicited by questions put to him by a police-constable, *without a previous caution*, was properly received in evidence, on the ground that it was the *voluntary*

(a) 1 Moody, C. C. 27.

(b) Jebb's Cr. Cas. 15.

act of the prisoner, not induced by either hope or threat. Thus the twelve Judges of Ireland, it appears by the report of that case, held "the rule to be well established, that a *voluntary* confession shall be received in evidence against a prisoner; but if "hope has been excited, or threats or intimidation held out, it "shall not be admitted."

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In *Gibney's case*, it is to be observed that it does not appear that any previous caution whatever had been given to the prisoner; but the police-constable proceeded at once to say to the prisoner:—"You must be a very unhappy boy, to have murdered your own child; if it be the case. Did you kill the child?" To which the prisoner replied "that he had done so about a fortnight before May."

Now, here is a case where all the Judges of Ireland, including the late Chief Justice Bushe as well as the late Mr. Justice Burton (the authority of both of whom, as we shall see presently, is invoked as having decided the contrary in another case), held deliberately that a confession obtained from a prisoner, through the instrumentality of questions from a police-constable, was properly received in evidence, *without any previous caution* having been given to the prisoner.

The next decision to which I refer is *Wilde's case (a)*, where all the Judges of England who had assembled, to the number of eleven, held unanimously that statements made by a prisoner, in answer to questions put to him by a person not in authority, and *who had given him no previous caution*, were, in strictness, receivable in evidence against him; but at the same time they expressed their disapproval of the mode in which the statements had been obtained, by questioning the prisoner. This case was ruled in 1835; and it appears by the report that the prisoner was at the time under fourteen years of age.

Then there comes to be considered *Regina v. Kerr (b)*, where Parke, B., admitted evidence of answers made by a prisoner, to questions put to him by a constable, *without any previous caution*.

In reference to that case, it is to be observed that, so satisfied do

(a) 1 Moo. C. C. 452.

(b) 1 Car. & P. 176.

E. T. 1864. both the Bar and the Bench in England appear to have been, at the
Crim. Appeal.
THE QUEEN period when it was decided (1837), that the law had been defi-
v. nitively settled by the previous decisions, as to the admissibility of
JOHNSTON. such evidence, that the prisoner's Counsel did not even object to
the evidence being given, but contented himself with complaining,
in his address to the jury, of the hardship on the prisoner to have
had questions put to him by the constable, without having been
previously cautioned: whereupon Parke, B., expressed himself
quite satisfied that the evidence was receivable *without any pre-*
vious caution having been given; adding however that, as a general
rule, he considered it better that the caution should be given, and
that, if he were himself in the position of a police-constable, he
would not have put a question to the prisoner without administering
the previous caution.

Thus we have, in that case, the distinction taken by Baron Parke
(as it has been so often taken by other Judges both in Ireland and
in England) between the legality of the practice and its expediency;
holding that, while he disapproved of it as a general rule, he felt
bound to assert its undoubted legality when acted on; or, in other
words, that though he might wish it were not the law, yet, being
satisfied that it was so, he must submit to it.

I do not here mention *Bartlett's case* (a), or *Regina v. Ellis* (b),
or other cases in England, which were relied on in the argument at
the Bar, as instances of the application of the doctrine of admis-
sions made by prisoners, in answer to questions put to them by
Magistrates, being afterwards received in evidence against them
on their trials,—for this reason, that those decisions appear to me
inapplicable to the question we are now considering, which has
reference to the practice of constables obtaining admissions from
prisoners by means of questions put to them; whereas the class
of cases to which I have just now referred stands upon a different
ground, as we shall presently find.

There may be other English authorities to the same effect as
those on which I have relied for the establishment of the general
principle, but I deem it unnecessary to notice them; as the latest

(a) 7 Car. & P. 832.

(b) Ryan & Moo. 422.

case in England on the subject (so far as I have been able to ascertain), which was decided in the course of the year 1862 or 1863, affirms the general doctrine of the admissibility of such evidence, although no previous caution had been given to the prisoner: I refer to the case of *Regina v. Cheverton* (a). In that case, a statement had been made by a prisoner, in answer to a question asked of him by a police-constable, and without it appearing that a previous caution had been given; and, on the part of the Crown, it was proposed to be given in evidence against the prisoner on his trial; but Erle, J., rejected it, not on the ground of the statement having been obtained from the prisoner by means of questions from the police-constable, but because it appeared that there had been some threat or inducement practised by the constable in obtaining the prisoner's answer to the question. The Crown Counsel then offered in evidence another statement, made afterwards by the prisoner to the inspector of police, and in answer to questions asked of him by the inspector, *who had given the prisoner no previous caution*; and this latter statement was allowed to be given in evidence by Erle, J., after a conference with Wightman, J.; both Judges considering that it had not been made under the influence of the threat or inducement which had rendered the first statement inadmissible. Then what was the difference between the two statements made by the prisoner in the foregoing case, which would account for the one being rejected in evidence while the other was admitted? Both statements, be it observed, were made in answer to questions from the police, without a previous caution in either case; but the difference between them was this, the former was considered by the Judge to have been made under the influence of some hope or threat, proceeding from the police, whereas the latter, though similar in all other respects to the former, was free from the influence of hope or threat, which had rendered the former inadmissible.

Thus the general result of the foregoing cases appears to be that, from the year 1822 down to the present time—that is, for a period of upwards of forty years,—it has been recognised as the

(a) 2 F. & F. 833.

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E. T. 1864. law of the land, both in England and Ireland, that admissions or
Crim. Appeal. statements obtained from prisoners through the instrumentality of
 THE QUEEN questions from police-constables, without any previous caution, are
 v. admissible in evidence against them; provided that such admissions
 JOHNSTON. or statements be the voluntary acts of the prisoners, not induced by
 either hope or threat operating on their minds.

Then, I ask, how is this host of authority to which I have referred encountered on behalf of the prisoner? It is met by two cases in England, which are supposed to have established the contrary doctrine; and by decisions of some of the Judges in Ireland, which are, in like manner, supposed to be counter to the English authorities.

I propose to show that neither of the English cases, which have been relied on at the Bar as containing a contrary doctrine, have that effect; and that the decisions of the Irish Judges do not conflict with the English authorities.

I take, first, the case of *The Queen v. Pettit* (a), which has been cited from *Cox's Reports*; and which, at first sight, might appear to be in principle the same as the case now before the Court. I have first to observe, with respect to this case, that whereas, by the statute of the 7 G. 4, Magistrates had been authorised to interrogate prisoners brought before them for examination, in respect of the offences with which they stood charged, they were deprived of that power by the 11 & 12 Vic. By the former Act, Magistrates had been expressly directed to "take the examination of prisoners," in like manner as they had been directed to do so by the old statute of *Philip and Mary*, in England, and the corresponding Act in Ireland.

We know historically that there had been periods in the history of both countries when that power, conferred by statute on Magistrates, had been much abused in practice; and at length it was judged expedient by the Legislature that it should cease to be exercised. Accordingly, the 11 & 12 Vic. (*Eng.*), corresponding to the 14 & 15 Vic. (*Ir.*), was enacted, whereby the 7 G. 4 was repealed, and the provision contained therein, that the Magistrates

(a) 4 Cox C. C. 164.

should "take the examination of the prisoner," was not re-enacted in the new statute; which, in lieu thereof, authorised the Magistrate to put one question, and one only, to the prisoner, namely, "does the prisoner wish to say anything as to the charge brought against him?"—or to that effect.

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Now, the case of *Regina v. Pettit* was ruled (if I recollect right) in the year 1850, and the 11 & 12 Vic. was passed in England in the year 1846; so that the ruling in that case must be looked at by the light afforded by that statute, which was then in full operation. Accordingly, when it was proposed by the Counsel for the Crown, in the case of *Regina v. Pettit*, to give in evidence against the prisoner a statement made by him, in answer to questions put to him—not by a police-constable, be it observed, but by the committing Magistrate,—Wilde, C. J., refused to admit the evidence, and put his refusal on the distinct ground that the Magistrate had no power, as the law then stood, to question the prisoner at all (save as above mentioned); and accordingly that the answers of the prisoner to other questions, not authorised by the statute, could not be received in evidence against him.

Thus, it appears that the ruling of Wilde, C. J., in the foregoing case, in no way conflicts with the authorities both in England and Ireland, which have held that the statements made by a prisoner in answer to questions put to him by a police-constable, provided there be no inducement and no threat, are in point of law admissible in evidence against him on his trial.

I abstain from discussing the matter which has been so much pressed at the Bar, as to the anomaly which is supposed to exist if it be held that, whereas the Magistrate is by law debarred from questioning a prisoner, save in the manner, and accompanied by the caution prescribed by the Act, the inferior officer, the police-constable, should be at liberty to examine the prisoner at large, and without any caution, and to give in evidence against him the statements so obtained. It is enough to observe, in reference to that matter, that it is for the Legislature to correct that supposed anomaly if they think fit. The law on the subject, as we have seen, was well understood and settled by authority, both in England

E. T. 1864. and Ireland, when the 11 & 12 *Vic.* was passed; and the Legislature, *Crim. Appeal.*
THE QUEEN when by that Act it deprived the Magistrate of the power of ques-
v. tioning the prisoner, and left it in the power of the police-constable
 JOHNSTON. to do so, we must suppose was actuated by wise reasons for taking that course; possibly they may have deemed it right, with a view to the detection of crime, and to facilitate bringing the offender to justice, to enable the constable to question the prisoner; although they may not have thought fit to extend the same power to the Magistrate.

The other English case which has been relied on by the prisoner's Counsel as an authority for the position that an admission made by a prisoner, in answer to questions put by a police-constable, without a caution, is not receivable in evidence against him, is *Regina v. Berriman (a)*. It is sufficient to observe that, in that case, as in *Regina v. Pettit*, the prisoner's statement, which was not allowed to be given in evidence against him, had been made in answer to questions put, *not* by a police-constable, but by a Magistrate; and that *Berriman's case* was decided after the passing of the 11 & 12 *Vic.* Accordingly it was held, by Erle, J., in *Berriman's case*, as it has been held by Wilde, C. J., in *Regina v. Pettit*, that, as the Magistrate had no authority to put questions to the prisoner, the answer of the latter could not be received. This is obviously not an authority for the prisoner, but on the other hand it is in one respect an authority against him; for it is there distinctly laid down by Erle, J., that where there is evidence that a crime has been committed, a police-constable is empowered to question a suspected person, in order to obtain information calculated to lead to the detection of the criminal.

Before leaving this branch of the discussion, I must say a word as to what has been urged strenuously on behalf of the prisoner. I mean the observation reported to have been made by Lord Campbell in *Baldry's case*, to the effect that whereas by the law of Scotland a prisoner may be examined *personally* in reference to the offence with which he stands charged, by the law of England *that* cannot be done. This *dictum* of Lord Campbell has been relied on at the

(a) 8 Cox, C. C. 388.

Bar, as an announcement by that very eminent Judge, that by the law of England a prisoner cannot be questioned by a police-constable on the subject of the offence charged against him. But can such a construction be put upon Lord Campbell's observation? In the first place it was not a judicial decision in any sense; there was no question to be decided in *Baldry's case* in reference to that matter at all; and in point of fact no questioning of a prisoner by a police-constable, or any other person, had taken place in that case. Then how came the observation to be made by Lord Campbell, and what was its real import? What occurred was this, in the progress of the argument at the Bar in *Baldry's case*, the prisoner's Counsel had mentioned *Pettit's case*, where Wilde, C. J., had rejected a statement made by a prisoner in answer to a question put to him by a Magistrate, whereupon Lord Campbell observed that, however that might be in Scotland, by the law of England it could not be done. But what could not be done? *not* that by the law of England a police-constable was not at liberty to question a prisoner; but that what was attempted by the Crown in *Pettit's case*, namely, giving in evidence against a prisoner a statement made by him in answer to questions put to him by a *Magistrate*, could not be done, the 11 & 12 Vic., having deprived the Magistrate of the power of questioning the prisoner. So understood, the observation of Lord Campbell is distinctly in affirmance of the ruling of Wilde, C. J., in *Pettit's case*, as well as of Erle, J., in *Regina v. Berriman*. But upon what principle can it be supposed that the Chief Justice of England, the head of the supreme Criminal Court of the kingdom, was ignorant of the fact of the Judges of England having pronounced over and over again that it was not contrary to law for a policeman to interrogate a prisoner touching the offence charged against him, or that Lord Campbell meant to announce that such a practice was contrary to law?

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FIGOT, C. B.

I consider the question now before us as arising, for the first time, for the decision of a Criminal Court of Appeal.

E. T. 1864. As to *Wild's case* (a), it was not argued by Counsel. The
Crim. Appeal. reasons of the judgment are not given; and we can learn the
 THE QUEEN point determined only by referring to the facts of the case as they
 v. appear in the report. The evidence comprised two portions, dis-
 JOHNSTON. tinct in their character. The first consisted of parol statements, made, on two successive days, to persons who asked the prisoner (a young boy) questions respecting the transaction of the alleged crime. He was not in the custody of a constable; and none of the persons who spoke to him was a Magistrate or a peace-officer. The second portion of the evidence was the prisoner's examination, taken of course before a Magistrate, after a caution given to the prisoner. The very first sentence of that examination referred to what the prisoner had previously stated; and may therefore be considered as incorporating, by that reference, his former statement in his examination before the Magistrate, taken down of course by the Magistrate in writing, under the Act of Parliament then in force. The examination began with these words:—"I can give no other account than I have already given." And then the prisoner proceeded to state nearly to the effect of what he had before told the persons to whom he had made the former disclosures. If the former statements were thus incorporated in the prisoner's examination, the whole evidence was, what the Judges held it to be, "in strictness admissible." If the previous disclosures were improperly elicited by the questions which were asked of the prisoner when he was under restraint (though not in custody of a constable), the Judges would most properly have "much disapproved of the mode in which" the confession was obtained. And, accordingly, they did express such disapprobation; and the prisoner, who was convicted of murder, was not executed.

As to the case of *Rex v. Gibney* (b), questions were certainly asked by the witness Lennon; and Lennon in his evidence stated that he asked the prisoner, "Did you kill the child?" and that the prisoner then said he did so, and stated the circumstances. But it appeared, upon the testimony of another witness for the prosecution, Arthur Foster, that, after conversing with the former

(a) 1 Moo. C. C. 452.

(b) Jebb, P. & C. C. 15.

witness, Lennon, about the child, "and upon both the witnesses again "expressing themselves on the subject of its death, the prisoner "said his conscience would not let him conceal it any longer; and "*he then confessed.*" It therefore appeared, when the explanation which Foster's evidence furnished of the evidence of Lennon, that the disclosures of the prisoner were not in reply to the questions which were put to him, but were, according to his own statement, the result of the impulse of his own conscience. There was, upon the entire evidence, that which may have satisfied the Judges in the consideration of the circumstances of that case, that the confession was not to be treated as elicited by the questions; and that it was, upon the admission of the prisoner, a purely voluntary confession. Whether they were right or wrong in that interpretation of the prisoner's avowal, if their decision was influenced by that view of the facts before them, it is not a decision upon the point now before us. Some of the learned Judges had at first doubts; but they ultimately treated the confession as a voluntary confession. On account of the extraordinary circumstances of the case, however, the prisoner was recommended to mercy; and he was not executed. *

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It is singular that, in each of those two cases which are now relied on in support of the admissibility of the evidence, the one in England and the other in Ireland, and in which the evidence came under the consideration of the Judges, the Judges were dissatisfied with the result; and the extreme sentence of the law was not executed.

With respect to the case of *Rex v. Gibney*, I think there is the strongest reason to believe that the point now before us was not at all intended to be determined by the Judges. Both Lord Chief Justice Bushe and Mr. Justice Burton were among the Judges who considered that case. The Lord Chief Justice was appointed to his office in February 1822. The case of *Rex v. Gibney* was brought under consideration at a meeting of the Judges, at which he must have presided, in the following November 1822. The case therefore was one of the earliest of this class which occurred in the discharge of his judicial functions, and was

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not likely to be forgotten by him. Mr. Justice Burton, who was then less than two years upon the Bench, was also one of the Judges; and yet both these eminent Judges afterwards held that evidence of this nature ought not to be received: *Regina v. Doyle* (a); *Regina v. Develin* (b). In the former case, the police-constable, who visited the prisoner in gaol, and put to her there the question which was objected to, "cautioned her against saying anything that might criminate herself, or be used for the purpose of convicting her;" yet, notwithstanding that caution, the Lord Chief Justice ruled that the answer to the question should not be given in evidence upon her trial. It has been suggested that Lord Chief Justice Bushe and Mr. Justice Burton must have forgotten the decision in *Rex v. Gibney*, where they ruled as they did in *Regina v. Doyle* and *Regina v. Develin*. In my opinion, it is to be presumed that they so ruled because they knew that the contrary had *not* been decided in *Rex v. Gibney*. If the point were an isolated matter, of rare occurrence, some such inadvertence might have been possible; but not in one of constant recurrence (as the experience of us all can testify) in criminal trials, in the vast majority of which the prisoner was arrested by the constabulary, who certainly are not less prone to question prisoners than constables in England.

In *Rex v. Thornton* (c), a lad of fourteen years of age had been apprehended without a warrant, kept without food, and not brought before the Magistrates until a late hour. In the course of the evening, a police-officer, who had ordered the prisoner to Bridewell of his own authority, told him that, in consequence of the falsehoods he had told, and the prevarications he had made, there was no doubt that he, the prisoner, had set the premises on fire; and he therefore asked him if any person had been concerned with him, or induced him to do it? The prisoner said he had not done it. The officer replied that he would not have told so many falsehoods as he had if he had not been concerned in it; and again asked him if anybody had induced him to do it. The prisoner then began to cry, and made a full confession. The question considered by the Judges

(a) 1 Cr. & Dix, C. C. 396.

(b) 2 Cr. & Dix, C. C. 151.

(c) 1 Moo. C. C. 127.

was, "whether a confession so obtained, where the detention of the prisoner was *perhaps illegal*, and where the conduct of the officer "was calculated to intimidate, was admissible in evidence?" Seven of the Judges held that the evidence was admissible, on the ground that no threat or promise had been used. Three of the Judges (Best, C. J., Bayley, J., and Holroyd, J.), were of a contrary opinion. The case was not argued by Counsel. The reasons of the Judges (as very constantly happened in the notes of the points reserved prior to the establishment of the Court of Criminal Appeal) are not given; and the *point was not reserved* in reference to the effect of the eliciting of evidence by the questioning of the prisoner. Undoubtedly, the resolutions of a majority of the Judges upon a question so reserved according to the former practice, was and is entitled to the greatest respect. It ought to be followed by individual Judges, *upon the point determined*, though determined in that form—the only form in which questions of evidence, in cases of felony, could practically have been submitted to an Appellate Tribunal before the institution of the Court of Criminal Appeal. But the very circumstance that the Judges, in considering points reserved in criminal cases, did not usually sit as an open Court of Law, hearing the questions argued with the assistance of Counsel, and delivering their judgments, with their reasons, in the face of the Profession and the public, constituted an objection to such a tribunal, which deprived it of much of the authority that would have otherwise attached to it, and led to the substitution of that tribunal which, in this country, we now compose. I have always thought that there was great force in the observation made by the late Mr. Justice Jebb, where a decision of the majority of the Judges, upon a point reserved on a civil-bill appeal, was cited to him. Such a decision was exactly analogous to that of the Judges determining upon a point reserved at a criminal trial. In neither case was it the decision of a regularly-constituted tribunal. In both cases, the resolution was often adopted without the hearing of Counsel. In both, the Judges determined, in Chamber, without assigning their reason. In the course

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of the argument in *Ranken v. Newsom* (a), the case of *Hogan v. Fitzgerald* was cited—a case decided before the Twelve Judges, in which it was held that a reversion was not necessary to enable a plaintiff to maintain a civil-bill ejectment for non-payment of rent, under the 56 G. 3, c. 88. Mr. *Jebb* said:—"With respect to that decision, there certainly was a difference of opinion among the Judges. It was not argued by Counsel; and I have no hesitation in saying that I do not consider myself bound by it."

It is undeniable that there has been, in reference to the admissibility of this kind of evidence, diversity of practice among Judges. The great preponderance of authority, in this country, has been against its reception. Among those who entertained and acted upon that opinion have been Judges as stern and determined in their resolution to repress crime, as any that have ever administered the Criminal Law in modern times. Among those whose opinions against the reception of the evidence have been reported in our books, we find Lord Chief Justice Bushe—*Regina v. Doyle* (b); Lord Chief Justice Doherty—*Regina v. Hughes* (c); Mr. Justice Burton (after consulting with Lord Chief Baron Brady)—*Regina v. Develin* (d). In *Regina v. Hassett* (e), Mr. Justice CHRISTIAN did not determine the point: but the evidence being offered, and my Brother CHRISTIAN having expressed his disapprobation of the practice, and intimated his opinion that the Crown ought not to press the evidence, it was withdrawn. In *Regina v. Grey*, mentioned in the note in 7 Cox, p. 246, and in Mr. *Levinge's* book on the Duties of Justices of the Peace, p. 56 (a book which, in passing, I may say, appears to me to have been prepared with much care and ability), such evidence was rejected by my LORD CHIEF JUSTICE. In *Regina v. Toole* (f), tried before myself and Baron Richards, we did not decide the abstract point; but the evidence was certainly offered and rejected. There is no reported case of any decision of Mr. Justice Perrin upon this point, during his long judicial career. But I can testify,

(a) 1 Hnd. & Bro. 77.

(c) 1 Cr. & Dix, C. C. 13.

(e) 8 Cox, C. C. 511.

(b) 1 Cr. & Dix, C. C. 396.

(d) 2 Cr. & Dix, C. C. 151.

(f) 7 Cox, C. C. 244.

both from having, for several years, acted before him as prosecuting Counsel for the Crown, when he went the Munster Circuit, and from having sat with him repeatedly at the Commission in Dublin, that that most learned and able Judge—and a higher authority I could not cite on Criminal and Constitutional Law—invariably rejected this species of evidence. His view was—long before a view precisely similar was, in similar terms, expressed by Lord Truro, in *Regina v. Pettit (a)*—that, to obtain admissions by interrogatories put to a prisoner *in vinculis*, was a species of torture—that it savoured of the character of the Inquisition, as it once prevailed in some continental countries, and was abhorrent to the principles and spirit of the English Law. Against this weight of judicial authority in Ireland there is but one reported decision in favor of the admissibility of such evidence—that of Mr. Justice Crampton, in *Regina v. Francis Hughes*, cited from M.S. note in *Joy upon the Admissibility of Confessions, and Challenges to Jurors*, p. 39.

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In England, the evidence of statements of prisoners elicited by questions put by constables and others, has been received in several reported cases, generally with strong expressions of the Judges in condemnation of the practice. I apprehend however that such is not the practice of all the English Judges. Lord Chief Justice Doherty, in *Regina v. Hughes (b)*, states that he was himself present when views, similar to those which he expressed in that case, were enunciated from the Bench in England. And in a case, of which the report has been published since the case now before us was argued, *Regina v. Mick (c)*, Mr. Justice Mellor, though he held that the evidence was admissible, expressed, in strong language, his condemnation of the practice; declaring that “*many Judges would not receive such evidence.*” Such being the state of the authorities in both countries, it appears to me to be our duty, as a Court of Criminal Appeal, to consider this question with reference to the principles on which, if it were now *res nova*, it ought to be determined. The question itself I regard as of the very greatest

(a) 4 Cox, 164, 165.

(b) 1 Cr. & Dix, C. C. 15.

(c) 3 F. & F. 822.

E. T. 1864. importance, with a view not only to the purity and impartiality
Crim. Appeal. at which our jurisprudence aims in administering the Criminal
 THE QUEEN Law, but to the dignity and credit of the administration of that
 v. JOHNSTON. law in those countries.

Let me premise that we have not here to determine whether, and how far, a constable or a private person may question one who is suspected of crime, respecting matters which it may be proper to learn, in order to determine whether the party ought or ought not to be arrested and brought before a Magistrate for further inquiry. Mr. Justice Erle, in condemning the practice of questioning for the purpose of establishing the guilt of a suspected person, distinguishes that course from such inquiries as may reasonably be made with a view to determine whether there are proper grounds for apprehending the party: *Regina v. Berriman* (a). Even for the latter purpose, he says, that such a course ought to be very sparingly resorted to. As to the former, he says:—"I wish it to go forth "among the inferior officers in the administration of justice, that "such a practice is entirely opposed to the spirit of our law." It may be a proper inquiry that a policeman, who sees a person in possession of goods under suspicious circumstances, should ask him what are the goods, and where he has received them. If such goods have been recently stolen, one of the facts on which an inference of guilt may be drawn by a jury is the inability of the possessor, on reasonable inquiry, to account for the possession of the recently stolen goods. It is essential, for the protection of the suspected person, to give *him* the opportunity of accounting for the possession of the goods. It is essential for the purpose of determining whether he shall be prosecuted, to ascertain whether he does or does not give a reasonable account of the stolen property found in his possession. The law allows the jury to draw the inference of guilt from the inability of the person with whom stolen property is found, under such circumstances, to account for the possession of it; therefore the inquiry may, and, I think, ought to be made; but this is a perfectly distinct matter from that with which we are here dealing. It is one question whether such an inquiry, so limited, may lawfully

(a) 6 Cox C. C. 389.

be made with a view to determine whether there are reasonable grounds for arresting a party who is suspected; it is another and a wholly different question, whether answers elicited by interrogations put with a view to establish the guilt of a prisoner in custody, and thus to make him, while a prisoner, his own accuser, shall be afterwards received in evidence against him upon his trial.

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[The principle by which the criminal tribunals have been always governed, in admitting or rejecting statements of prisoners criminatory of themselves, has been that, in order to make evidence of such statements admissible, it must be shown to the satisfaction of the Judge that the statements have been purely *voluntary statements* of the prisoner, and the statement must not be elicited by temporal hope or fear caused in the prisoner's mind by a person having authority: and there is high legal authority for holding that the prosecutor is bound to satisfy the Judge, affirmatively, of the absence of any such inducement resulting from hope or fear so caused, before evidence of a confession shall be received: *Regina v. Warrington* (a) [from the M.S. note of Baron Parke].

In considering whether statements made by a prisoner, in answer to questions put by the officer of the law in whose custody he is when questioned, are voluntary statements, we must have regard not only to the relative position in which they stood towards each other, but also to the ordinary infirmities of mankind, especially those which are likely to exist among the ignorant and uneducated in the lower classes of society. The danger to be guarded against is not, in the far greatest number of cases, that an innocent man will fabricate a statement of his own guilt, although instances of this have occurred, too well attested to be doubted: the danger is, that an innocent person suddenly arrested, and questioned by one having the power to detain or set free, will—when subjected to interrogatories which *may* be administered in the mildest, or *may* be administered in the harshest way, and to persons of the strongest and boldest, or of the most feeble and nervous natures—make statements not consistent with truth, in order to escape from the pressure of the moment. A prisoner so circumstanced

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may not hear, in terms, one word of hope held out or of mischief threatened; and yet he may, and in many cases must, be actuated by hope that his answers will lead to his liberation, or fear that his answers may cause his detention in custody. He is placed in immediate contact with one who for the time is his gaoler, for the most part with no third person present to witness what passes, and almost always without the presence of any person to whom he can appeal for protection, or who may control the examination within fair or reasonable bounds. Manner may menace and cause fear as much as words. Manner may insinuate hope as well as verbal assurances. The very act of questioning is in itself an indication that the questioner will or may liberate the answerer if the answers are satisfactory, and detain him if they are not.

When a constable cautions his prisoner that he is not bound to say anything to criminate himself, but that what he shall say may be used in evidence against him on his trial, then, if the constable says nothing for the purpose of eliciting a disclosure, the prisoner is left to the voluntary agency of his own mind. But if the constable puts a series of searching interrogatories, he virtually, and, I think, actually and in effect, abandons the caution, and announces, by the very course of interrogation which he applies, that it is better for the prisoner to answer than to be silent. The process of question impresses, on the greater part of mankind, the belief that silence will be taken as an assent to what the questions imply. The very necessity which that impression suggests, of answering the question in *some* way, deprives the prisoner of his free agency; and impels him to answer, from the fear of the consequences of declining to do so. Daily experience shows that witnesses, having deposed to the strict truth, become, on a severe or artful cross-examination, involved in contradictions and excuses, destructive of their credit and of their direct testimony. A prisoner is still more liable to make statements of that character, under the pressure of interrogatories urged by the person who holds him in custody; and thus truth, the object of the evidence of admissions so elicited, is defeated by the very method ostensibly used to attain it. This relative position of the parties does not therefore tend to truth, as the result

of the inquiry. It does tend, in the strongest way, to make the statement of the prisoner the reverse of voluntary; and cause a necessary tendency to make the answers of the prisoner the result of the promptings of fear or hope, or both, operating upon his mind. It was upon this ground that, while the Acts of 1 *Philip and Mary*, c. 13, and 2 & 3 *Philip and Mary*, c. 10, were in force in England, Lord Chief Baron Richards, in *Rex v. Wilson (a)*, held that an examination of a prisoner, taken down by a Magistrate, but elicited by interrogatories, should not be received in evidence against him on his trial. While those statutes, and that of the 7 *G. 4*, c. 64 (which, in substance, extended to misdemeanors the provisions of the former statute applicable only to felony), were in force, Mr. Justice Holroyd, according to a *note* in 2 *Starkie on Evidence*, p. 39, admitted an examination under similar circumstances to those under which it was rejected by Lord Chief Baron Richards; and in *Rex v. Ellis (b)*, Mr. Justice Littledale expressed an opinion in accordance with that of Mr. Justice Holroyd; although, at his suggestion, the case was not pressed by the Crown, and the prisoner was acquitted. It seems probable that the views of those Judges who admitted the statements, although elicited by the questions of the Magistrate, were influenced by the word "examination," which is used in the statutes of *Philip and Mary* and of the 7 *G. 4*, c. 64, in describing the written statement of the prisoner; and it was plainly to correct this, and to place the duty of the Magistrate, in dealing with the prisoner, upon grounds clear and defined, that the Legislature, in repealing the former statutes, and in prescribing the procedure to be applied when prisoners are brought before Magistrates, charged with indictable offences, omitted the word "examination," and introduced the word "statement" into the English statute 11 & 12 *Vic.*, c. 42, s. 18, and into the Irish statute 14 & 15 *Vic.*, c. 93, s. 14, subdivision 2. In both these Acts of Parliament, which now regulate the procedure before Magistrates, the legislation is such as to preclude the Magistrate from interrogating the prisoner. This was so ruled by Lord Chief

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(a) Holt's N. P. C. 597.

(b) Ryan & Moody, 432.

E. T. 1864. Justice Erle (then Mr. Justice Erle), in *Regina v. Berriman* (a), and
Crim. Appeal. had been previously determined by Lord Truro, when Lord Chief
 THE QUEEN Justice of the Common Pleas, in the case of *Regina v. Pettit*, in
 v. terms which disclose a principle so applicable to the case now before
 JOHNSTON. us that I shall state them here :—"I think I ought not to receive
 "this evidence; and I reject it upon the general ground that
 "Magistrates have no right to put questions to a prisoner with
 "reference to any matter having a bearing upon the charge upon
 "which he is brought before them. The law is so extremely
 "cautious in guarding against anything like torture, that it extends
 "a similar principle to every case where a man is not a free agent
 "in meeting an inquiry. If this sort of examination be admitted
 "in evidence, it is hard to say where it might stop. A person in
 "custody or other imprisonment, questioned by a Magistrate, who
 "has power to commit him and power to release him, might think
 "himself bound to answer, for fear of being sent to gaol. The
 "mind, in such a case, would be likely to be affected by the very
 "influences which render the statements of accused persons inad-
 "missible" (b).

In my judgment, the relative positions of the constable who has custody of the prisoner and of the prisoner who is in custody of the constable, negatives the fact that the prisoner is a free agent. It rebuts any presumption that the prisoner's statement is voluntary, and furnishes the strongest presumption that it is not. It is calculated to cause the answers elicited by interrogatories to be influenced by hope and fear; and, upon the principle on which evidence of confessions has been hitherto rejected, when influenced by either of these motives, I am of opinion that the evidence in the present case ought not to have been received.

MONAHAN, C. J.

The cases bearing on the question now before us have been so fully and accurately referred to by several Members of the Court who have preceded me, that I do not consider it necessary to go through them in detail, or attempt to reconcile what is absolutely

(a) 6 Cox, C. C. 388.

(b) 4 Cox C. C. 165.

irreconcilable: neither is it an easy task to deduce from them any certain principle applicable to the present case. No doubt, *prima facie*, any statement made by a party is evidence against him in any proceedings, civil or criminal; and it is now clearly settled, by the highest authority, that the fact of a confession having been made by a prisoner in custody, to a constable in whose custody he is, does not necessarily render the confession inadmissible. That is clearly established by *Baldry's case* (a). In that case it was assumed that the admissibility or non-admissibility of the evidence depended on the fact whether the constable held out to the prisoner the promise or assurance of any worldly advantage in regard to the charge, as the consequence of making a statement, or the threat of harm, as the consequence of refraining from doing so; and accordingly in that case the constable, having stated to the prisoner he was charged with administering poison to his wife, told him he need not say anything to criminate himself; what he did say would be taken down, and used in evidence against him. The case was argued at very great length; cases referred to, in which Judges held that telling a prisoner what he said would be used for or against him, was holding out an inducement to make a statement, and therefore the evidence was rejected. These cases were however overruled by the Court of Criminal Appeal; and that Court held that what the constable said to the prisoner did not amount either to a promise or a threat, and that the evidence was properly received; and the conviction affirmed.

In the present case, the facts are:—The prisoner, having been suspected of shoplifting in the city of Dublin, two police-constables were directed to watch her movements; but no warrant had been issued for her arrest. The constables either accompanied or followed her from Dublin to Kingstown, by railway; and saw her, on two occasions, in the shop of Mr. Hutchings, a boot and shoemaker. They returned in the same carriage with her from Kingstown to Dublin, not being aware that any theft had been committed in Kingstown. When they arrived in Dublin, the police perceived a small parcel with her, and told her who they were; that she was

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described to them as having stolen boots in Dublin; that she was charged with felony. They did not tell her she was in custody, but stated, in answer to the Judge, they would not have let her go. The constable asked her what she had in the parcel. She said, "two pair of boots." Witness then took the parcel out of her hand. They were four odd boots; and witness asked her where she got them. She said "she was made a present of them in Kingstown." Witness told her he saw her in Mr. Hutchings's shop in Kingstown, and asked her "was it there she got them?" She said "yes; that she took them out of that." The witness then, for the first time, told her she was not bound to say anything to criminate herself; and that they would arrest her, and bring her to the barracks.

Now, the first objection made to the statement of the prisoner is, that the police-constable did not give her the usual caution, that she was not bound to say anything to criminate herself. *Stripp's case* (a) decides that what a prisoner states, in a proceeding before a Magistrate, is evidence against him, though not preceded by a caution. The facts in that case were:—The prisoner was brought before a Magistrate, by a constable, who applied for a remand, to make further searches and inquiries; and, in the course of the application for the remand, the constable stated that he believed it was with a chisel the prisoner had opened the cash-box which he produced. The prisoner interrupted him, and said it was not with a chisel, but with a hammer he had opened it. The question was, whether this admission was receivable in evidence. Jervis, C. J., giving the judgment of the Court, says:—"The 18th section of "the 11 & 12 Vic., c. 42, applies only to the concluding examination before the committing Magistrate, after all the witnesses "have been examined, and does not apply to a voluntary statement "made by a prisoner in the course of the examination, and before "the conclusion of the case for the prosecution. Such a statement "is admissible; and it is immaterial whether made before, during, "or after a remand." Therefore, I should say, the mere absence of the caution does not render the evidence inadmissible. But the

(a) 1 Dearsly, 649.

question which has been principally argued (and in fact is the foundation of the judgment of my LORD CHIEF BARON and my Brother O'BRIEN) is, that the admission of the prisoner is in answer to questions asked by the constable; and this really is the difficulty in the case. Does the asking of these questions—"What have you got there?" "Where did you get them?" "I saw you in Mr. Hutchings's shop; was it there you got them?"—hold out any hope of benefit to the prisoner by answering them, or any threat of injury by refusing to do so? When the constable asked these questions, no charge in relation to the boots in question had been made. The owner of the goods was not aware they had been stolen, nor was the constable. It was the suspicious appearance of the parcel, and previous information in relation to the prisoner, that induced the constable to suspect her. I cannot say the case is free from difficulty; but, after giving the matter the most full consideration in my power, I have come to the conclusion that the mere asking of these questions is not, *per se*, calculated to convey to the prisoner either hope of benefit or threat of injury, from making a statement one way or the other; and therefore are not, on that ground, objectionable.

But it has been argued that, though nothing has been said or done by the constable which can be construed into an inducement or a threat, still that a person in custody of a constable, or who, without being in custody, is asked about property found in his possession, may, not unnaturally, be under the impression that it is for his advantage to make a statement in answer to the question so asked. This certainly may be so; yet still I am not aware that an answer, not amounting to a confession of guilt, has been, in a case like the present, rejected in evidence, as in the present case. Could the answer of the prisoner, that "she had been made a present of them in Kingstown," be objected to? I know that in practice, in several cases, such evidence has been constantly received; and the false account of the property given by the prisoner the principal ground of his conviction. If then the first question and answer are not objectionable, it seems difficult to say that the other question

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JOHNSTON. The recent reported English case, most strongly relied on by the prisoner's Counsel, is that before Chief Justice Wilde, *Regina v. Pettit (a)*; and which, to say the least of it, is not disapproved of by Lord Campbell in *Baldry's case (b)*, to which I have already referred. In that case, a man having been shot about nine o'clock in the evening, the prisoner was arrested in a few hours afterwards, and brought before the Magistrates who assembled for the purpose, and was asked certain questions by the Magistrates. The report does not state what the questions or answers were. Chief Justice Wilde rejected the evidence, saying:—"I think I ought not to "receive this evidence; and I reject it on the general ground "that Magistrates have no right to put questions to a prisoner "with reference to any matter having a bearing on the charge "upon which he is brought before them. The law is so extremely "cautious in guarding against anything like torture, that it extends "a similar principle to every case where a man is not a free agent "in meeting an inquiry. If this sort of examination be admitted "in evidence, it is hard to say where it might stop. A prisoner "in custody or other imprisonment, questioned by a Magistrate "who has power to commit him and power to release him, might "think himself bound to answer for fear of being sent to gaol; "the mind in such a case would be likely to be affected by the "very influences which render the statements of accused persons "inadmissible." The evidence was therefore rejected, and the prisoner acquitted. In *Baldry's case*, where this case was referred to by the Counsel for the prisoner, Lord Campbell's observation is:—"Prisoners are not to be interrogated; by the law of Scotland they may be; but by the law of England they cannot." I shall not now stop to consider whether, if *Pettit's case* comes to be reviewed in the Court of Criminal Appeal, it is likely to be affirmed. I do not think that question arises in the present case. This is not the case of a prisoner brought before a Magistrate on a specific charge, and interrogated by him in relation to that charge; nor

(a) 4 Cox, C. C. 164.

(b) 2 Den. C. C. 430.

is it the case of a party arrested by a constable under a warrant on a specific charge, and interrogated by him in relation to that charge, in both of which cases the Magistrate and constable do what they have no authority or necessity for doing; but, in the case before the Court, a constable finds a party, under suspicious circumstances, in possession of property, which he has grounds to suspect as being stolen. I do not doubt but that under such circumstances the constable is justified in making inquiries in relation to the property, in order to determine whether he shall arrest the party or not. Even though this inquiry is continued beyond the point when the constable determines in his own mind to arrest the party, I cannot consider that the questions so asked, or the answers given, come within the reason of the rule laid down by Chief Justice Wilde, whether these answers be a denial or confession of the previous guilt.

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On the whole therefore I am of opinion that there is nothing in this case to show that the prisoner's statement was the result of hopes held out or injury threatened; and that it does not come within the rule laid down by Chief Justice Wilde; and therefore that the evidence was properly received, and that the conviction should be affirmed.

LEFROY, C. J.

The question in this case is, whether the confession of the prisoner, made to a policeman, as reported to us by the learned Judges who tried the case, was admissible in evidence—that is, was it admissible under all the circumstances under which that statement, or what is called a confession here, was made? We are all agreed that, to render it admissible, it must have been made freely and voluntarily; and that it is for those who bring forward the evidence to show that it was so made. This is put beyond any doubt by the case of *The Queen v. Baldry*, where it was decided that, unless the Judge is satisfied that the confession is made freely and voluntarily, he should not let the evidence go to the jury. Whether the confession be true or not, is for the jury; but the question whether it

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In looking through the long list of cases decided before the constitution of the Court of Criminal Appeal, we find that the decisions of individual Judges furnish a mass of varying and somewhat contradictory authority; we find, under the very same circumstances, decisions directly contradictory; nor is it wonderful that this should be the case, until a tribunal was established for the purpose of reviewing all these cases, and, as far as possible, extracting from them some principle common to all. That is, as I conceive, the great object of this Court of Criminal Appeal—namely, to extract from the decisions which have taken place some clear and common principle, which may guide Magistrates and policemen in the regulation of their conduct in proceedings of this nature. This appears to have been already attained, to a certain extent; for the rule is clearly established that, wherever a confession is obtained by means of any inducement, or by any hope of advantage, or by holding out any threat, there the confession cannot be received. But the converse of that proposition has not been established; and it is most important to look at the case in this respect, and to see whether, although there has been no inducement, no promise of advantage, and no threat, the confession is receivable in evidence. Hitherto the only question that has been raised in such cases is, whether there has been such inducement or threat; and not whether the confession has been made freely and voluntarily. The criterion derived from the absence of threat or inducement, is, in my opinion, but a particular instance of a general rule, and not the rule itself. The great inquiry in all such cases must be, whether the confession was made under circumstances which show that it was made freely and voluntarily; and the great mistake that has been made is, that the inquiry has been, not whether the confession was made freely and voluntarily, but whether it was made in the absence of any threat or inducement. It may have been made under circumstances showing that it was not made under the influence of any threat or inducement, and yet may not have been made freely and voluntarily. And what I lay my finger on in the present case, as

showing the violation of this great principle of the law, is that the party was entrapped into making the confession by the course taken by the sergeant of police, in following up his examination of the prisoner.

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The great principle is laid down by *Hawkins*, in these words:—
“The human mind, under the pressure of calamity, is easily seduced, and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction.”—(2 *Hawkins*, *P. C.*, c. 46, s. 3, n. 4, p. 604, 2nd edition).

The great principle therefore upon which *Hawkins* states that a confession, obtained either by inducement or threat, is not admissible in evidence, is, that “The law will not suffer a prisoner to be made the deluded instrument of his own conviction.” I think these last words are most essential; for they show the reason why the existence of either hope or threat will oust the admission of the confession in evidence.

I shall presently come to consider the facts of this case, and to consider whether there is not ample evidence that the prisoner here has been the deluded instrument of her own conviction; and if that be the result of the evidence, according to this authority, which is the highest we have in the law, for it is laid down on the authority of Lord Hale, the conviction in this case cannot be sustained. But there is another authority which it appears to me also most important to refer to—it is the judgment of Lord Denman, in *The Queen v. Arnold* (a), decided in the year 1838. In summing up in that case, his Lordship says:—“The frequent warnings given to prisoners not to say anything that may criminate themselves, render it necessary for me to set right a prevalent error on this subject, and to state what I conceive to be the proper

(a) 8 C. & P. 621.

E. T. 1864. "course of proceeding. A prisoner is not to be entrapped into
Crim. Appeal. "making any statement; but when a prisoner is willing to make
THE QUEEN "a statement, it is the duty of Magistrates to record it; but
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JOHNSTON. "Magistrates, before they do so, ought entirely to get rid of any
"impression that may have before been on the prisoner's mind,
"that the statement may be used for his own benefit; and the
"prisoner ought also to be told that what he thinks fit to say
"will be taken down, and may be used against him on his trial.
"There are two things important to be considered and observed,
"the prisoner must not be entrapped into making a confession
"or statement; but if he does make it, it is right that he should
"be cautioned in the first instance, and should be told that he
"need not make any statement; but if he is willing to make a
"statement, he has a right to do so; and the Magistrate should
"then give him a caution that what he says will be taken down
"in writing, and may be used against him on his trial." It is
all important to observe that this judgment was previous to the
passing of the Act for Regulating the Proceedings before Magis-
trates in Criminal Cases (11 & 12 *Vic.*, c. 42), and that Lord
Denman then stated it to be the duty of the Magistrate to give
the prisoner a caution, first, to see that he is not entrapped, and
next, to show him that whatever he may say will be taken down
in writing, and may be used against him. Here, then, is what
Lord Denman represents to be the law before the late Act of Parlia-
ment was passed. Is it possible that, if a Magistrate was bound, as
the law then stood, to guard the prisoner against being entrapped, a
police-constable could be allowed to put questions to a prisoner upon
any other terms? What was stated to be then the law in respect of
the duties of Magistrates, is precisely that which, by the Act of Par-
liament, is pointed out; and therefore, as has been observed, this Act
of Parliament was passed to give legislative effect to the statement
of the Chief Justice. But it is said that, although the Legislature
have passed a law obliging Magistrates to adopt this course, and
to continue that which was the proper practice at the time of
the passing of the Act, it has not interfered with the practice

adopted by police-constables. But, I would ask, what inherent right have the police to ask a prisoner to make statements, or to put questions, if the Act did not give it to them? And, if a Magistrate could not obtain a statement from a prisoner without a previous caution, is it possible to imagine that the police could have any such privilege? We have heard no authority for anything of the kind. When the police are made aware that a felony has been committed, they merely take measures to arrest the felon; and, to justify themselves in arresting him, it may be necessary to ask questions; but does it follow that, because they are at liberty to ask questions which may be necessary under the circumstances, they should be privileged to give in evidence the answers they may receive to those questions, given without any previous caution? for, in the case before us, it is remarkable that the caution was not given until the answers were obtained. I shall have occasion to advert to that matter more particularly hereafter; but I refer to it now to show that the police in fact claim a privilege beyond what the Magistrates have or had previous to the statute, and with regard to which they are, since the statute, specially limited by an express negative provision. It seems to me impossible therefore, looking either to the Common Law or the statute, when we consider the right of the subject not to be made the instrument of his own conviction, to say that he is to be deprived of that right by the questioning of a police-constable.

Hitherto, the question argued has been, not whether the statement was made freely and voluntarily, but whether it was made under the inducement of hope or fear. That is not the real question. The existence of such an inducement is an admitted ground for the exclusion of the evidence; but is it the only ground of exclusion? In the present case, a confession and statement has been made, under circumstances demonstrative of its not having been freely and voluntarily made. I have taken down the dialogue exactly as it occurred, and as it has been reported to us by the learned Judge who tried the case. The constable said to the prisoner, "We belong to the police." This statement was all right

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and proper; it apprised the prisoner who the persons were who were addressing her; and, at the same time, it apprised her that they were persons who had power to take her to the police-office on a charge, if they thought fit. The policeman went on and said, "You have been described to us as having stolen boots from a shop in the city." She therefore had been described to them as having committed a felony, and was in fact charged with having stolen goods in her possession. He then asked her, "What have you got in the parcel?" The policeman states that at this time they would not have let the prisoner go; but they did not tell her so; they gave her no caution; but, on the other hand, they held out no inducement. The prisoner said, "I have two pairs of boots in it." The policeman then took the parcel from her, and asked her where she got them. She said, "I was made a present of them in Kingstown." The constable next said, "I saw you in Mr. Hutchings's shop in Kingstown; was it there you got them?" To which she replied, "Yes; I took them out of that." The constable then, after that answer, told her she was not bound to say anything that might criminate her. Now, here we have a regular cross-examination of the prisoner, by which she is brought into this dilemma—either she should convict herself of having told a falsehood, in having said she was made a present of them; or she must confess the crime. Is not this what Lord Denman calls "entrapping a prisoner?" or is it not what *Hawkins* terms "making her the deluded instrument of her own conviction?" And if it be necessary that a prisoner's statement should be made freely and voluntarily, in order to make it admissible in evidence, is it to be held that this statement can be admitted in evidence, obtained, as it was, by a course of proceeding which, though it held out no threat or inducement, was yet but an ingenious stratagem, which had the effect of making her the deluded instrument of her own conviction? If this be not within the objection made by *Hawkins* and Lord Denman to "entrapping the prisoner into a difficulty," I do not know what is; and it also appears to come within that further objection laid down by Lord Denman that, when a prisoner makes a statement,

there should be a previous caution, and that he should be told that what he says, if he chooses to say anything, will be taken down, and may be used against him at his trial.

E. T. 1864.
Crim. Appeal.
THE QUEEN
v.
JOHNSTON.

If, then, the true principle be that, in order to make the statement of the prisoner legal evidence on his trial, it must appear clearly to the Judge who tries the case that the statement was made freely and voluntarily (and, according to the case of *The Queen v. Baldry*, it is not sufficient unless this requirement be satisfied), is there any ground, in the present instance, for saying that the Judge who tried the case was satisfied that the statement was made freely and voluntarily? I do not think there is.

Upon these grounds, it appears to me that the evidence in question should not have been admitted; and that, it having been admitted, the conviction is wrong, and should be quashed.

The majority of the Court being of opinion that the conviction should be affirmed—

Per Curiam—Conviction affirmed.

M. T. 1864.

Exchequer.

LAMBERT v. M'DONNELL.

(Exchequer.)

Nov. 3, 5.

UPON the surrender to the head landlord, of a farm, held under a lease for lives, upon the day of the surrender, he informed the defendant, a sub-yearly tenant of a house upon the farm, of the surrender by his immediate lessor, and the defendant acquiesced in it. The defendant, who was ploughman, at weekly wages, to the landlord, agreed to continue in possession of the house, as caretaker, until some other house could be procured for him by the landlord. No demand of possession was made by the plaintiff, nor was rent paid by the defendant, who received his weekly wages, and twice inquired if another house had been prepared for him. Upon the defendant's refusal to accept a house offered to him by the plaintiff, the latter dismissed him from his employment.

THIS was an action of ejectment on the title, and was tried before O'Brien, J., at the Spring Assizes 1864, for the county of Kilkenny. A. Lambert sen., father of the plaintiff, in the year 1828, made a lease of a farm to John Bryan, for three lives. Upon the decease of John Bryan, his son D. Bryan went into possession of the farm. Upon Bryan's farm stood a house, in which the defendant, who was a ploughman, at weekly wages, in the employment of A. Lambert sen., lived, and for which he paid £1 a-year rent to Bryan. Upon the 6th of November 1849, by deed of surrender, indorsed upon the lease of 1828, D. Bryan surrendered all the lands comprised in that lease, except the defendant's house, to A. Lambert sen. At the trial, A. Lambert jun., the plaintiff, thus detailed what occurred with reference to that cabin, upon the day of the surrender of the farm:—

"I went to defendant upon the 6th of November 1849, and I told him that Daniel Bryan had given up possession of the farm, and I asked him was he satisfied? He said yes. He said he hoped we would not charge him rent, as Bryan did, as he (defendant) was a poor man. I told him that, instead of charging him rent, my father and I would leave him in the house as a caretaker, until such time as we could provide him with a house elsewhere; and I asked him was he satisfied to take it on those terms? He said he was; and that he would do anything we wished. M'Donnell was

Upon an ejectment on the title, by the plaintiff—*Held*, that the agreement entered into by the parties amounted to a surrender, in law, by the defendant; his occupation of the house being inconsistent with the possession of any estate in the premises.

"then my father's ploughman, and was ploughing that day. Within
 "a year after he asked me, when I was going to give him the slate
 "house I promised him? I said we would give it to him as soon as
 "we should have it built."

M. T. 1864.
Exchequer.
 LAMBERT
 v.
 M'DONNELL.

The defendant was dismissed, by A. Lambert sen., from his employment in 1851, and was taken back in 1854. A. Lambert sen. died in the year 1856. In 1857 his heir, A. Lambert jun., the plaintiff, asked the defendant to go into another house, which he pointed out. He said he would not take it. A. Lambert sen. paid the defendant five shillings per week; the plaintiff paid him six shillings per week. In September 1862, the plaintiff offered the defendant another house, much better than the house in dispute. Upon his refusal to accept it, the plaintiff dismissed him, and demanded possession.

His Lordship left two questions to the jury—first, whether the defendant had been a yearly tenant of the house to D. Bryan, at the date of the surrender? secondly, whether the defendant, at the time of the surrender by Bryan, agreed to remain in the house in question, as caretaker to A. Lambert sen. and the plaintiff, until such time as they could provide him with a house elsewhere? The jury found, on both questions, in the affirmative; and his Lordship directed a verdict for the defendant, reserving leave to the plaintiff to move to change it into a verdict for himself.

A conditional order to change the verdict, pursuant to the leave reserved, having been obtained—

M. O'Donnell (with whom ~~was~~ *J. Flood*) now showed cause.

The surrender of the land by Bryan did not affect M'Donnell's interest; and the only evidence of a surrender by the latter was a parol agreement to become, at some future time, a tenant to the plaintiff: *Creagh v. Blood* (a); *Crowley v. Vitty* (b); *Foquet v. Moore* (c); *Doe d. The Earl of Egremont v. Courtenay* (d); *Lynch v. Lynch* (e).

(a) 1 Jon. & Lat. 133.

(b) 7 Exch. 319.

(c) 7 Exch. 870.

(d) 11 Q. B. 702.

(e) 6 Ir. Law Rep. 131.

M. T. 1864. *J. B. Walsh* (with whom was *P. F. White*), contra.

Eschequer.

LAMBERT

v.

M'DONNELL.

The acceptance of the custody of the house by M'Donnell was a surrender by him, to A. Lambert sen., of his tenancy from year to year to Bryan: *Gybson v. Searl* (a), cited in *Com, Dig.*, tit. *Surrender* (I); *Earl of Arundel v. Lord Gray* (b); *Peter v. Kendal* (c); *Nicholls v. Atherstone* (d); *Jones d. Lord Lorton v. Murphy* (e); and the cases collected in *The Duchess of Kingston's case* (f).

FITZGERALD, J.

Nov. 5.

This was an ejectment on the title, to obtain possession of a house situate in the county of Kilkenny.

It appeared at the trial that, in the year 1828, the plaintiff's father demised a parcel of land, on which was the house in question, to a person named Bryan. The lease was for a life which must be taken to be still in existence. Subsequently to this demise, the defendant became tenant from year to year, of the house only, to Bryan, at a rent of £1 yearly. As such tenant, the defendant was in occupation of the house in the year 1849, and was at the same time in the employment of the plaintiff's father as a ploughman, at weekly wages.

In this state of things, Bryan, on the 6th of November 1849, by a writing endorsed on his lease, surrendered his estate in the premises demised by the lease of 1828 to the plaintiff's father. This put an end to Bryan's estate in the premises, as between him and the plaintiff's father; but did not of course determine the sub-interest of the defendant, which the jury has found to have been subsisting at the time of the surrender.

In virtue of the surrender, the plaintiff's father, through the plaintiff, obtained possession of the demised premises, except the house; and on the same day on which possession was so taken, the plaintiff, acting for his father, had an interview with the defendant. He apprised the defendant of what Bryan had done,

(a) Cro. Jac. 177.

(b) Dyer, 200, pl. 62.

(c) 6 B. & C. 703.

(d) 10 Q. B. 944.

(e) 2 Jebb. & Sy. 323.

(f) 2 Smith, L. C., 5th ed., 713.

and asked him whether he acquiesced in it? To this the defendant replied that he did so; and hoped that he should not now be obliged to pay rent for the house as he had hitherto done.

M. T. 1864.
Exchequer.
 LAMBERT
 v.
 M'DONNELL.

It was then, as the jury has found, agreed between the defendant and the plaintiff, acting for his father, that the defendant (then being the ploughman of the plaintiff's father) should continue in possession of the house as caretaker, until some other house could be procured for him by the plaintiff's father.

The defendant did continue, and has so continued, in possession, until the present time, paying no rent, and with the exception of a short interval, during which he did not act as ploughman, receiving his weekly wages as ploughman, from the plaintiff's father during his lifetime, and from the plaintiff since his decease.

The defendant on two occasions applied for another house; but the plaintiff's father and the plaintiff on those occasions were not prepared to give him one; but they recognised the agreement, by again promising to get him such.

Finally, in the year 1862, the plaintiff, having offered the defendant another house, which he refused to accept, dismissed him from his employment as ploughman; and afterwards, having demanded possession of the house in question, brought the present ejectionment.

The question is whether, in this state of facts, there was a surrender in law by the defendant, to the plaintiff's father, of his interest in the house subsisting at the time of Bryan's surrender. I am of opinion that, assuming the agreement found by the jury to have been acted on, it would amount to a surrender in law, because the defendant's occupation of the house as caretaker for the plaintiff's father, by agreement between them, would be inconsistent with his having an estate in the premises.

The whole difficulty in the case seems to me to be, whether we can hold the agreement to have been acted on; which involves two considerations—whether there was evidence that it was so acted on; and, if there was, whether we can act on that evidence without a finding of the jury to that effect. I am of opinion that there was such evidence, in the continued payment

M. T. 1864. of the defendant's wages as ploughman, accompanied by the absence
Erchequer. of any demand on the one side, and any payment of rent on the
LAMBERT other, and the request of the defendant for another house, and
v. the plaintiff's offer of another. I am also of opinion that the
M'DONNELL. learned Judge must be understood as having put the only question
 in controversy to the jury, and that we ought now to direct such
 verdict as the Judge ought to have directed, on the assumption
 that the jury believed the evidence given by the plaintiff.

That being so, I think the judgment ought to be entered for
 the plaintiff, pursuant to the leave reserved; and accordingly that
 the conditional order to that effect ought to be made absolute.

Conditional order made absolute.

MOORE v. THE DUBLIN AND MEATH RAILWAY CO.*

Nov. 4.

To an action
 of detinue, the
 defendant can-
 not plead pay-
 ment of money
 into Court in
 satisfaction of
 the value of
 the goods.

THE first count of the summons and plaint in this action charged
 the defendants with negligence in the carriage of a heifer, whereby
 same was injured.

The second count was in trover. The third count was in detinue.

The plaintiff claimed as damages on the first and second count,
 £25; and on the third count a return of the said heifer, or its value,
 with £25 damages for its detention.

Plea:—Payment into Court of £15.

Demurrer to the plea of payment, to the count in detinue.

Points of demurrer:—First, that the right of suing in detinue is to
 obtain a specific delivery of the goods detained, and not their value.
 Second, that the defendants have not the option of retaining the
 goods detained, upon payment of their value. Third, that the plea
 of payment into Court, if available, would deprive the Court of
 the power of exercising the jurisdiction given by section 80 of the

* *Coram* FITZGERALD, HUGHES, and DEASY, BB.

Common Law Procedure Act 1856. Fourth, that the defendants by their plea should offer to return the goods, and pay the money into Court, in respect of the damages sustained by their detention.

M. T. 1864.

Exchequer.

MOORE

v.

THE DUBLIN
AND MEATH
RAILWAY.

C. Palles and *M. O'Donnell*, in support of the demurrer.

Allan v. Dunn (a) is a direct authority that payment of money into Court cannot be pleaded to a count in detinue. That case was decided upon the construction of the Common Law Procedure Acts, (*Eng.*) 1852, sec. 70, and, 1856, sec. 78. The third Act of 1860, sec. 25, allows a defendant in England, in an action of detinue, *by leave of the Court, or of a Judge*, to pay into Court the value of the goods detained. There is no provision in the Irish Common Law Procedure Acts corresponding to section 25 in the English Common Law Procedure Act of 1860; the latter meets the case of *Allan v. Dunn*. If this plea be good, a plaintiff in detinue can never recover the specific chattel detained, under the 80th section of the Common Law Procedure Act (*Ir.*) 1856: *Danby v. Lamb* (b).

G. Cree (with whom was *J. Coffey*), in support of the plea.

An action of detinue is a "personal action:" *Common Law Procedure Act* (*Ir.*) 1853. By section 75 of that Act, the "defendant in any personal action whatever," except in certain actions therein specified, "may pay into Court a sum of money by way of compensation or amends." The plaintiff here claims not the specific chattel only, but damages for its detention also; therefore this is not a case in which the Court should exercise its equitable jurisdiction, under the 80th section of the Procedure Act of 1856, but should allow the money to be paid into Court.

M. O'Donnell was not called upon to reply.

FITZGERALD, B.

This demurrer must be allowed. Were this plea to stand, no judgment could be entered upon the count in detinue. But

(a) 1 H. & N. 572.

(b) 11 Com. B., N. S., 423.

M. T. 1864. as the 80th section of the Common Law Procedure Act 1856 pre-
Erchequer.
MOORE supposes judgment to have been obtained by the plaintiff, and
v. that the value of the chattel has been assessed, the Court could
THE DUBLIN never exercise its equitable jurisdiction under that section, were
AND MEATH we to allow this plea to stand.
RAILWAY.

DEASY, B.

To allow a defendant in detinue to pay money into Court would be to allow a defendant to take possession of a plaintiff's property at his own valuation.

Demurrer allowed.

ENRIGHT v. KAVANAGH.*

Nov. 3, 23.

A, resident in the county of Dublin, agreed to sell to B, who resided in the same county, a quantity of bricks to be delivered in the county of the city of Dublin. The bricks having been delivered, A sued B for their price in one of the Superior Courts, and recovered £10.—*Held*, that the plaintiff was entitled to half costs, "the cause of action" having arisen out of the civil-bill jurisdiction in which both parties resided.

THIS was an action for goods sold and delivered. The plaintiff and the defendant resided in the county Dublin. The defendant asked the plaintiff to supply him with some bricks; and the plaintiff replied that he might take the requisite quantity from the plaintiff's depot of bricks at Portobello, upon the banks of the Grand Canal, situate within the county of the city of Dublin. The defendant drew 11,000 bricks from the plaintiff's depot. The first demand for payment was made by the plaintiff, in a letter, containing an account, addressed &c., and delivered at the defendant's residence in the county Dublin. The action was tried before Hayes, J., during Easter Term 1864, in the Consolidated Nisi Prius Court. The jury found for the plaintiff, £10, the full value of the bricks. Upon the taxation of costs, the Assistant Taxing-Master ruled that the defendant was not entitled to any costs, under the provisions of the Common Law Procedure Act (Ireland) 1856, s. 97, being of opinion that the non-payment of the money was the cause of action.

* *Coram* FITZGERALD, HUGHES and DEASY, BB.

Upon appeal to the Principal Taxing-Master of the Court of Exchequer, he affirmed the former ruling.

M. T. 1864.

Eschequer.

ENRIGHT

v.

KAVANAGH.

Upon appeal to the Court—

W. J. O'Driscoll, for the plaintiff, contended that the cause of action arose where the bricks were delivered, viz., within the county of the city of Dublin, a different civil-bill jurisdiction from that in which the parties resided: *Common Law Procedure Act (Ireland) 1853, s. 243*; *Common Law Procedure Act (Ireland) 1856, s. 97*.

Curtis, contra.

The consideration being executed, a promise to pay upon request arose in law: *Hopkins v. Logan (a)*; *Christie v. Peat (b)*. Here the cause of action arose in the county of Dublin, where the defendant received the plaintiff's letter, inclosing the account and demanding payment.

O'Driscoll, in reply.

If a man obtain goods in Dublin, if a letter requesting payment reaches him in Constantinople, can the cause of action be said to arise in Turkey in Europe?

FITZGERALD, B.

In this case, the plaintiff and defendant both resided in the county of Dublin. The Taxing-Master was of opinion that, under the circumstances, the plaintiff should get no costs; being of opinion that the cause of action was the non-payment of the money. The bricks, the subject of the contract, were to be delivered upon the banks of the Grand Canal, within the county of the city of Dublin; and they were delivered to him there. We are of opinion that the cause of action was the delivery of the bricks, and that the plaintiff is entitled to half-costs.

Nov. 23.

Motion granted without costs.

(a) 5 M. & W. 241.

(b) 7 M. & W. 491.

M. T. 1864.

Exchequer.

TUDOR v. LAWSON.*

Nov. 3, 25.

The "registered Dublin residence" of an attorney, who lives with his family, more than three miles from the city of Dublin, and practises under a country license, is not "a residence," within the meanings of the Common Law Procedure Act (Ireland) 1856, s. 97, or of the 14 & 15 Vic., c. 57, s. 89, in the civil bill jurisdiction of the city of Dublin.

THIS was an appeal from the ruling of the Taxing-Master. The plaintiff resided and carried on his business in the city of Dublin; the defendant, an attorney practising under a country license, resided with his family in the city of Kilkenny. After the commencement of the action out of which this question arose, the plaintiff died; and his representatives agreed to accept and compromise the matter, upon the terms that the defendant should let judgment go by default for £6. 10s. 0d., "and all costs necessarily and properly incurred."

Upon the taxation of the costs, the Taxing-Master adjudged half the costs to be paid by the defendant; being of opinion that the defendant's registered address in Dublin, as an attorney, was not a residence within the same civil-bill jurisdiction as the plaintiff.

From this ruling the defendant now appealed.

J. W. Harris, for the defendant.

It is compulsory upon the defendant to have a registered address in Dublin, because every practising attorney is supposed to be actually residing in Dublin. The defendant was frequently in Dublin, often for long periods: *Moffatt v. M'Ternan* (a). This is a far stronger case than *D'Arcy v. Hastings* (b). There, the fact of the plaintiff having an office in the city of Dublin was held to bring him within the same civil-bill jurisdiction as the defendant. Here, the defendant is compelled to have an address in the city of Dublin, at which all communications must reach him.

W. J. O'Driscoll, contra.

The defendant's registered address is not his residence: *Tom v.*

(a) 6 Ir. Jur. 177.

(b) 10 Ir. Com. Law Rep., App. xxiv.

* *Coram* FITZGERALD, HUGHES and DEASY, BB.

Nagle (a). Nor could it be treated as "his place of business," within the 14 & 15 *Vic.*, c. 57 (Civil-bill Act), ss. 65 and 69. M. T. 1864.

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TUDOR
v.
LAWSON.

J. W. Harris, in reply.

Cur. ad. vult.

FITZGERALD, B.

The certificate of taxation has been objected to in this case, on the ground that both parties reside within the jurisdiction of the Civil-bill Court of the city of Dublin, in which the cause of action arose.

Nov. 25.

It appears that the defendant is a practising attorney, having his usual residence more than three miles from the city of Dublin, and who has taken out what is called a "country license" only. He has however, as he is obliged to have by the 112th General Order, a place in Dublin, registered, as what is in that order called "his Dublin residence."

The Taxing-Master did not consider that such place was his residence, within the meaning of the 97th section of the Common Law Procedure Act of 1856.

Whether it be or not, must, we think, depend on what is, or not, usual residence, within the meaning of the 69th section of the Civil-bill Consolidation Act (14 & 15 *Vic.*, c. 57, s. 69), which gives jurisdiction to the Chairman of a County against such defendants only as usually reside within such county. That section however provides that if any person shall "have *and occupy*" an office for carrying on any business in any county, he shall be deemed to have a residence within such county.

We are of opinion that an attorney, taking out a country license only, and whose usual residence is more than three miles from Dublin, is not to be considered as resident in Dublin, within the meaning of the Civil-bill Act, by reason only of his having what is commonly called his registered place of business in Dublin, though termed a residence in the 112th General Order.

The Stamp Act (5 & 6 *Vic.*, c. 82, s. 16) prohibits an attorney, taking out such license, from ordinarily carrying on his business

M. T. 1864. within the city of Dublin, or within three miles thereof, or from
Exchequer. residing for the space of forty days or more, in any year, within
 TUDOR those limits.
 v.

LAWSON.

That being so, and assuming, as we are bound to do in the absence of any evidence to the contrary, that the provision has been complied with by the defendant, we do not think that he is a resident in Dublin, within the meaning of the Civil-bill Consolidation Act.

Motion refused, with costs.

M'ARDLE v. THE IRISH IODINE AND MARINE SALTS
 MANUFACTURING COMPANY (Limited)

Nov. 17, 25.

A deed executed by A, on behalf of B, must, in order to bind B, be executed by A in the name of B, or by A in his own name, with such words as show that he is acting solely as the agent of B in such execution.

A Company incorporated by registration is not bound by a deed of agreement entered into by its directors, as trustees for or on behalf of the Company, which is not under the seal of the Company.

THE summons and plaint charged that "by an agreement, made upon the 12th of February 1863, between the plaintiff of the one part, and J. H. Nunn, P. H. Thompson, and J. Aldridge, three of the directors, and on behalf of the said Company, the defendants, of the other part, it was agreed, by the said J. H. Nunn, P. H. Thompson, and J. Aldridge, on behalf of the said Company," to purchase from the plaintiff all his rights under certain letters patent, granted to the plaintiff in England, Belgium, and France, for an improved treatment of seaweeds, for £12,500, "to be paid by the said Company, the defendants, in manner following:"—£600 upon the allotment of 12,500 shares, and £400 on payment of the first instalment of five shillings per share; and a further sum of £300 in three months after the Company should have commenced business.

The summons and plaint then averred the allotment of the 12,500 shares, the payment to him "by the defendants" of £600, the payment of a second instalment upon the shares allotted, and the establishment of "the Company's" chemical works at Galway; and

their management by the plaintiff while they were in operation, from the 18th of April 1863 to the 29th of May 1864.

Damages were laid at £700, the amount of the two sums of £400 and £300. The usual money counts, and one for work and labor, &c. &c., were also added.

M. T. 1864.
Exchequer.
 M'ARDLE
 v.
 THE IRISH
 IODINE CO.

The defendants pleaded that they did not enter into the agreement, as alleged; that the agreement was obtained by the fraud and misrepresentation of the plaintiff; that the letters patent, mentioned in the agreement, were invalid, and of no use or value; a traverse of the money counts; and that the causes of action arose from the plaintiff's misrepresentation.

The action was tried at the Summer Assizes for the county of Galway, 1864, before DEASY, B., and a special jury. The plaintiff gave in evidence (*inter alia*) the agreement of the 12th of February 1863, which was by deed, under the separate seals of the plaintiff and of the three directors; the memorandum, and the articles of association of the defendants as a Company, with limited liability, for the purposes therein, dated the 27th of January 1863. Counsel called upon the Judge to direct a verdict for the defendants, on the ground, first, that the agreement of the 12th of February 1863 was not binding upon the Company; secondly, that the agreement had been pleaded as a simple contract. His Lordship refused to so direct the jury, but nonsuited the plaintiff.

A conditional order for a new trial having been obtained—

P. Blake (with whom were *M. Morris* and *Todd*) now showed cause.

The agreement of the 12th of February 1863, by its terms, shows that it is a deed *inter partes*, and cannot bind the Company. It binds only those who signed it. It is made by J. H. Nunn, P. H. Thompson, and J. Aldridge, "on behalf of, and in trust for, the Irish Iodine and Marine Salts Manufacturing Company (limited)." After reciting that the plaintiff and his friends had formed a Joint-stock Company, under the above title, it goes on to say—"of which "said Company the said parties hereto of the second part are con-

M. T. 1864. "stituted, by the articles of association of the said Company, three
Exchequer.
 "of the first directors."

M'ARDLE
 v.
 THE IRISH
 IODINE CO.

The plaintiff agrees, upon payment of £600 to him, to deposit his letters patent "with the law agent of the said intended Company," to be held "in trust for the said parties hereto of the second part, on behalf of the said Company, and the said James G. M'Ardle, until the whole of said purchase of the patents shall have been paid." The 75th clause of the articles of association provides for the custody and use of the common seal of the Company, by which alone the Company, being a corporation, could be bound: *The Mayor of Ludlow v. Charlton (a)*; *East London Waterworks Company v. Bailey (b)*; *Diggle v. The London and Blackwall Railway Company (c)*.

The evils produced by the 19 & 20 Vic., c. 47, s. 41, under which a Company could be bound by a contract in writing made by any person acting "under the express or implied authority of the Company," led to its repeal in the third schedule to the Companies Act 1862 (25 & 26 Vic., c. 89). The latter statute, by its 55th section, enables any Company to empower any person, by instrument in writing under its common seal, to execute deeds abroad; therefore that special exception proves the general rule, i. e., that corporations are bound only by instruments under their common seal: *Payne v. The South Wales Coal, &c., &c., Company (d)*; *Gunn v. The London and Lancashire Fire Insurance Company (e)*.

The summons and plaint contains a clear departure; a contract cannot be spelt out of a deed on which an action in covenant (if any) lay: *Schack v. Antony (f)*.

James Robinson and William Duggan, contra.

Upon the registration of this Company, every person who signed the articles of association was bound by them, and the subsequent purchasers of shares therein were equally bound: *The New Brunswick and Canada Railway and Land Company v. Connybeare (g)*.

(a) 6 M. & W. 115.

(b) 4 Bing. 283.

(c) 5 Exch. 442.

(d) 10 Exch. 283.

(e) 12 Scott, N. S., 696.

(f) 1 M. & S. 573.

(g) 9 H. of L. Cas. 711.

The second clause of the articles of association declares that, "the parties who have signed the memorandum of association, being directors of the Company, have entered into agreement on behalf of the Company, with J. S. M'Ardle, for the purchase of," &c., &c., upon the terms set out in the summons and plaint. The 45th clause sets out the names of the directors, amongst which the parties of the second part of the agreement appear. The 46th clause fixes the quorum at three; the 47th clause empowers the directors to contract for the purchase, from J. S. M'Ardle, of all his rights under his letters patent, &c. Therefore the Company is bound by that agreement of the 12th of February 1864: *Thompson v. The Wesleyan Newspaper Association* (a); *Regina v. The Justices of Cumberland* (b); *Arnold v. The Mayor, Aldermen, and Burgesses of Poole* (c). The Company was incorporated on the 7th of February, and the agreement was made on the 12th of February. The payment of £600 to the plaintiff was an adoption of the agreement, by the Company: *Haigh v. The Guardians of North Bierley Union* (d).

M. T. 1864.
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M. Morris, in reply, cited *Mostyn v. The Calcott Hall Mining Company* (e).

FIGOT, C. B.

The question raised upon this conditional order to set aside the nonsuit is simply whether, upon the articles of agreement of the 12th of February 1863, the present action can be sustained against the Company as a corporation, contracting with the plaintiff, by those articles, which were executed under the separate seals of three directors.

Nov. 25.

For the purposes of the argument it may be assumed (and I think there is *prima facie* evidence of it, received without objection at the trial) that the Company was registered and incorporated on the 7th of February, before the execution of the articles of agreement upon

(a) 8 Com. B. 849.

(b) 5 Railway Cas. 333.

(c) 4 M. & G. 860.

(d) ELL B. & ELL 873.

(e) 1 Fost. & F. 334.

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which this action is brought. And it may be further assumed that the articles of association of the Company were registered, together with the memorandum of association, under the Act of Parliament.

The first question is, did the articles of association authorise the three directors to bind, by the articles of agreement of the 12th of February, the Company which was incorporated by the Registry, so as to make them liable to a covenant entered into by the directors under the directors' seals? It is apparent from several provisions of the articles of association, that no such power was intended to be conferred. The 47th clause of those articles provides that the directors shall have power to contract for the purchase, from James M'Ardle, of the patent right in question. The 46th clause makes three directors a quorum. But in no part of the deed is any power expressed to be conferred upon them of entering into any such contract of purchase in any prescribed form. Where it is intended that the directors should enter into contracts, otherwise than in the ordinary mode by which a corporate body is bound (that is, by means of their common seal), there is an express provision for that purpose. Thus, the 50th clause provides that the directors may make, issue, indorse, and accept bills of exchange in the name or on the account of the Company. And the absence of any similar provision as to the form in which other contracts, to be binding on the Company, are to be entered into, leads directly to the inference that such contracts should be effected by the ordinary form generally prescribed by law for the contracts of a corporate body; namely, by the use of their common seal. Accordingly, the 75th clause provides:—"That the seal of the Company shall be placed in the custody of such person or persons as the directors shall, from time to time, determine on, and shall be used only upon the authority of two or more directors." It appears to me that the articles of association did not authorise the directors, or any three of them, to make a contract by a deed under their own seals, which should, by such deed, be binding at law as the contract of the Company; and there is no evidence of any other authority in the three parties to those articles of agreement, so as to bind the Company at law.

But in the next place, the frame and contents of the deed show

that such was not its scope or operation. The instrument purports to be, in terms :—"Articles of agreement made and entered into "on the 12th day of February 1863, by and between James Smith "M'Ardle," of, &c., "of the one part, and Thomas Nunn," of, &c., "Thomas Higginbotham," of, &c., "and John Aldridge," of, &c., "*on behalf of and in trust for* the Irish Iodine and Marine Salts "Company (limited), of the other part." This shows that the contract contemplated by the instrument was to be, not between M'Ardle and the Company, but between M'Ardle and the parties of the second part, as the Company's trustees. The instrument then recites the formation of the Company, and that the Company "*is intended to be registered* with limited liability, as provided by the "Acts of Parliament in that behalf;" showing that when the instrument was prepared, the Company had not yet been incorporated by registry; a plain reason for the contract being, for their benefit, made by and in the name of their trustees. After reciting that, by the articles of association, the parties of the second part were constituted three of the directors of the Company, the instrument proceeds further to recite, that M'Ardle had exhibited (not to the Company, but) "to the parties hereto of the second part," certain reports, testimonials, and figures, which are set out at considerable length. It then recites that M'Ardle had agreed to sell the patents and patent rights previously mentioned (being a British and a Belgian patent), "to the parties hereto of the second part, on behalf of and for the said Company," for certain considerations specified, and that "the said parties hereto of the second part agreed to purchase the said letters patent, with all the rights," &c., "under them," upon the specified terms. It recites that M'Ardle had stated (not to the Company, but) to the parties of the second part, that a sum of £1500 was sufficient for certain purposes set forth in the instrument; and then follow the words of express contract :—"It is agreed by "the "said James Smith M'Ardle, and the said parties hereto, of the "second part, that," &c., setting forth the terms of the agreement. Among these terms is a proviso that, upon payment of a certain sum (£600) to M'Ardle, the several letters patent shall be deposited with the law agent or agents of "the said intended Company, to

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M. T. 1864. *"be held in trust for the said parties hereto of the second part,*
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v. *"M'Ardle, until the whole of the purchase-money" shall have been*
THE IRISH *paid; and that, upon such payment, "the said James Smith*
IODINE CO. *"M'Ardle shall execute and perfect a proper deed of assignment*
"or other assurance, transferring and making over" (not to the
Company, but) "to the said parties of the second part, or to such
"other person or persons as may be nominated and appointed by
"the said Company as their trustees, on behalf of and in trust
"for the said Company, the said several letters patent, and all
"rights and privileges under or by virtue of the same." This
provision is the clearest possible indication that it was intended
that the legal ownership in the patents should be vested in trust-
tees for the Company; and that, in the first instance, that owner-
ship should vest in the parties to this instrument of the second
part; and, coupled with the other portions of the instrument to
which I have referred, it leaves no room for doubt that the contract
contained in the articles of agreement of the 12th of February
was made, not with the Company, but with the three trustees
of the Company, who signed the articles, and who sealed them
with their separate seals. There is a provision at the close, which
still further confirms this view of the instrument. It provides
"that the foregoing articles of agreement shall apply to the sur-
"vivors and assigns of the said several parties hereto of the
"first and second parts respectively." Whatever may be the legal
effect of the provision, it plainly shows that the parties contem-
plated, at all events, this, that some of the trustees might die before
the contract should be performed, and that the rights under the
contract should enure to the survivors.

Wholly independently of the views which I have stated, it appears to me that the form of this instrument is such as to bring it within a rule of law, founded upon the strictness with which instruments under seal are regarded by the law of England, and laid down in several authorities, both ancient and modern, to which, I own I am surprised that, no reference was made at the

Bar, including *Frontise v. Small* (a), *Appleton v. Binhs* (b), and *Berkely v. Hardy* (c). According to that rule (with some very special exceptions, which have no application here), no person can be sued upon an instrument under seal, made *inter partes*, who is not a party to the deed; and, where a deed is executed by one person on behalf of another, either he must, in order to bind that other person, execute it, either using the name of his principal, or he must employ such words as show that he executed it, not as himself a party to the deed, but as the agent, in the act of executing it, of his principal. The form of words is immaterial, if in substance this is done. In this instrument, not only is the Company not named as a party, but there is no contract whatever expressed to be made with the Company; and their seal is not to the deed; and the three directors, in executing the instrument, not only do not profess to do so in the name, or on the part of the Company, but show, on the contrary, that they execute it as being themselves parties to the deed. The words used are—"In witness whereof *the parties* aforesaid have hereunto set *their hands and seals*, the day and year first in these presents written;" and thereupon follow the separate signatures and *separate seals* of M'Ardle and of the three directors.

We are all of opinion that the nonsuit directed by my Brother DEASY was right; and the cause shown against this conditional order must be allowed.

Cause shown allowed.

(a) Lord Ray. Rep. 1418.

(b) 5 East, 748.

(c) 5 Barn. & Cress. 355; S. C., 8 Dow. & Ryl. 102; and see *Combe's case* (5 Coke, part ix, p. 76 b, 77 a); and *Barford v. Stukely* (3 B. & B. 333; S. C., 5 B. Moore, 23); *White v. Cuyler* (6 T. R. 177).

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THE QUEEN, at the prosecution of CHARLES LANYON,
 v.
 THE MAYOR for the time being of the Borough of BELFAST.*

Nov. 20, 21,
 24.

(*Queen's Bench.*)

A burgess of a borough (other than Dublin) in Ireland, is disentitled to have his name retained on the burgess-roll, if the rate-book, for the time being in force, does not evidence that the very premises, in respect of which he claims a right to the municipal franchise, were, during the twelve months prior to the last day of August preceding the revision, rated to the relief of the poor, at the annual rated value of not less than £10.

MANDAMUS.—The material facts which appeared in the prosecutor's affidavit were these:—For several years preceding the 1st of May 1862, the prosecutor had been in occupation of the dwelling-house 14 Wellington-place, Belfast, at the side and rere of which were offices, entered by a separate door in Upper Queen-street, and occupied and used by him and his two partners in their business of architects and engineers.

On the 25th of June 1861, the Poor-law Guardians of the Union of Belfast struck a rate, wherein the prosecutor was rated as occupier of the *entire* of said premises, which were described as *house and offices No. 14 Wellington-place, and of the annual value of £114*. The prosecutor was enrolled a burgess in respect thereof for the year 1862.

On the 1st of May 1862, the prosecutor, having sublet the dwelling-house 14 Wellington-place to Dr. Stronge, ceased to occupy it; but continued with his partners to occupy, and they still occupy, the offices in Upper Queen-street, which now are, and from the 1st day of May 1862, have been separate and detached from the dwelling-house 14 Wellington-place.

The Commissioner of Valuations for Ireland, in pursuance of the provisions of the 15 & 16 Vic., c. 63, made a valuation of the union, and rated the *entire* premises at the annual value of £120. That valuation having been completed some months earlier, and

* Before HAYES and FITZGERALD, JJ.—[LEFROY, C. J., was absent from indisposition, and O'BRIEN, J., was sitting as one of the Members of the Court of Appeal in Chancery].

in force during the interval, was duly revised on the 25th of April 1862, and signed by the Assistant Commissioner of Valuations on that day. At that revision, the valuation of the premises was altered into two separate valuations, namely, 14 Wellington-place at the annual value of £90, and the offices in Upper Queen-street at the annual value of £30.

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On the 24th of June 1862, the prosecutor caused a notice to be served on the Poor-law Guardians of the Union, claiming to be rated jointly with his partners in respect of the offices which were therein described as a counting-house, No. 2 Upper Queen-street; and caused a tender to be made of the rates then payable in respect thereof. The guardians did not comply with the notice.

On the 25th of June 1862, another rate, based on the revised valuation, was struck; and the prosecutor and his partners were therein rated as occupiers of No. 2 Upper Queen-street, at the annual value of £30. The Town-clerk returned the prosecutor's name on the list of persons who were entitled to be enrolled as burgesses for the ensuing year; but that an objection to the retention of the prosecutor's name on the burgess-roll was duly served by one John O'Hanlon. The prosecutor duly served a notice to be enrolled a burgess in respect of the successive occupation of 14 Wellington-place and 2 Upper Queen-street.

At the revision of the burgess-roll, the prosecutor, being Mayor of the Borough for the year 1862, declined to preside at the hearing of the objection and claim; and Alderman Ewart, who was elected his *locum tenens* to hear this particular objection and claim, with the advice of the two Assessors of the borough, disallowed the prosecutor's claim, and, on the 3rd of November 1862, struck his name off the burgess-roll.

It further appeared that no taxes remained unpaid in respect of the said premises.

The notice served by the prosecutor on the Guardians was this:—"Claim to be rated. Union of Belfast. Pursuant to the "Act of 13 & 14 Vic., c. 69.—I, Charles Lanyon, being occupier, "jointly with two other persons, of a tenement hereinafter described, which tenement is rated under the Act for the more

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"effectual Relief of the Destitute Poor in Ireland, at a net annual value of £30 and upwards, and is situate in the borough of Belfast, electoral division of Belfast, in which there was a rate made for the relief of the destitute poor on the 25th day of June 1861 last, from which rate my name has been omitted as such occupier of such premises, do hereby give notice to you, the Guardians of Belfast Union, that I claim to be rated in respect of such premises, that is to say, as joint-occupier of a counting-house situate at No. 2 Upper Queen-street, in the said borough and union."

"Dated 3rd day of May 1862."

"CHARLES LANYON."

Upon these facts the Court granted a conditional order, dated the 8th of November 1862, for a writ of *mandamus*, directed to William Ewart, Alderman, acting as Mayor for the occasion, and to the Mayor for the time being of the borough of Belfast, commanding them, or one of them, to insert the name of him, the said Charles Lanyon, as a burgess on the burgess-roll of and for the St. George's ward of the borough of Belfast; on the grounds that he, the said Charles Lanyon, was and is duly qualified to be a burgess of the said ward; and that possessing the qualifications and having complied with the requirements of the statutory enactments in that behalf, he should have been retained and enrolled on the said burgess-roll, at the revision thereof held on the first and third instant.

There were no affidavits filed to oppose the application, except one, which merely raised the point of law.

Whiteside, Macdonogh and *Harrison*, moved to make the conditional order absolute. The Assessors disallowed Mr. Lanyon's claim, on the ground "That, there being no separate rating of the counting-house during the interval between the 1st of May 1862 and the 25th of June following, there was no legal mode of ascertaining its value; and that the revised list of the tenement valuation made under the 15 & 16 *Vic.*, c. 63, could not be looked at for that purpose." Had they referred to that list, the

counting-house would have appeared to be of the value required by the 3 & 4 Vic., c. 108, for it had been described therein as of the annual value of £30. That list was sufficient evidence of the value of the counting-house; for although, under the 15 & 16 Vic., c. 63, s. 27, the use of the list was not, for the purposes of striking a new rate, obligatory on the guardians until thirty-days after its signature, it was binding for all other purposes, and had been in force in Belfast for some months prior to the 25th of April 1862. The whole preamble and scope of the Act show that the revised list is to be looked at for purposes other than the striking of *future* rates. It was the duty of the guardians to have made out from the revised list, which had been completed under a Public General Act, the value of the counting-house; but their omission to perform that duty cannot prejudice the right of the applicant, who, having fulfilled all the duties necessary to be performed by him, is secured his municipal franchise by the 3 & Vic., c. 108, s. 33, notwithstanding the neglect of the guardians. That view is borne out by the 6 & 7 Vic., c. 93, s. 27, which does not make the "value" of the premises the test of a party's right.

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The cases of *Wauchob v. Reynolds* (a), and *In re Quinn* (b), cannot rule the present case; because they were decided before the passing of the 15 & 16 Vic., c. 63, which must be read along with the 3 & 4 Vic., c. 108, ss. 30 and 33.

The tender of the rates was sufficient: *In re Delaney* (c). It is not necessary that the premises should continue to be of the full value during the whole period for which they are rated: *In re M'Donnell* (d). The Acts upon which the question arises must be construed so as to extend the remedy: *Murphy v. Leader* (e); *The King v. Hall* (f); *The King v. The Inhabitants of Everton* (g). An equitable construction must prevail over the letter of the Act: *Egston v. Studd* (h).

(a) 1 Ir. Com. Law Rep. 142.

(c) 2 Cr. & Dix, 536.

(e) 1 Jebb & Bourke, 74.

(g) 9 East, 101.

(b) 3 Cr. & Dix, 285.

(d) 1 Ir. Cir. Cas. 1.

(f) 1 B. & Cr. 123.

(h) 2 Plow. 465.

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Serjeant *Sullivan*, *E. R. Barry* and *C. M. Richards*, contra.

A claimant of the franchise under the 3 & 4 Vic., c. 108, s. 30, must be in fact rated in respect of *the* premises out of which he claims. Those very premises must appear on the rate-book as rated by themselves, separately and apart from all other premises; for that section requires them to be of a certain yearly value, which is to be ascertained in the mode therein prescribed, "*and not otherwise.*" This prescription has not been repealed by the 15 & 16 Vic., c. 63; and those words, "*and not otherwise,*" cannot be struck out of the section—*Miller v. Salomons* (a) (*per* Pollock, C. B.) and *Gilman v. Crowley* (b)—which must be construed strictly: *Phibbs v. Kerans* (c). Now, the counting-house, No. 2 Upper Queen-street, did not appear on the rate-book, so as to enable the guardians to ascertain its yearly value; and no person can be rated except in respect of premises which have been separately rated already: *Wauchob v. Reynolds* (d). The notice of claim indeed stated that the counting-house was then rated under the Act; but it was only rated as part of a block of premises, from the remainder of which it was not in any way distinguishable, so as to admit of its separate value being ascertained. The notice of claim was also defective in this particular, that it did not call on the guardians to rate the claimant separately in respect to the counting-house. If a burgess, during the year for which he is rated, parts with any portion of the premises in respect of which he is rated *in globo*, he *ipso facto* loses his qualification. No doubt he may, on going to new premises, or on parting with a portion of his premises, claim the franchise, by way of successive occupation, under section 30. But then the new premises, or the retained portion of the old premises, must each have been separately rated, so that their yearly value may be capable of ascertainment in the manner pointed out by the statute. If not, guardians may, at any moment, be required to rate premises separately, and so disturb the rating of the whole union. The rate too would become variable during the year, according as the premises had increased or diminished in value. In the present case, if

(a) 7 Exch. Rep. 559, 560.

(b) 7 Ir. Com. Law Rep. 557.

(c) 11 Ir. Com. Law Rep. 294.

(d) 1 Ir. Com. Law Rep. 142, 153.

the Guardians had, as they were required to do, adopted the value given by the revised list, the value must have been raised from £114 to £120 on the block of buildings. How could the Guardians apportion that increase?

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The 33rd section does not help the applicant, or give any party a right to call on the Guardians to rate him in respect of certain premises not yet separately rated. It assumes that a mistake has been made, in omitting to rate the claimant personally in respect of certain premises, which however have been already rated in such an isolated manner that their yearly value can, by a reference to the rate-book, be separately ascertained. But the Guardians themselves have not any power to rate the premises. They can do no more for a claimant than insert his name, if it has been omitted; and can do even that only when all the other conditions of the statute have been fulfilled. Section 33 makes "it lawful for any person occupying any . . . counting-house . . . to claim to be rated to the relief of the poor in respect of such premises respectively." Those words assume that the premises have been already rated. Again, the same section requires the claimant to pay up "the full amount of the last-made rate then payable in respect of such premises." If the premises have not been therefore separately rated, how can the Guardians ascertain the amount payable in respect of them? and how can the claimant pay an unascertained sum? The 3 & 4 Vic., c. 108, cannot receive the equitable construction for which the defendant contended: *Gray v. Pearson* (a); *Brandling v. Barrington* (b).

Counsel also cited *Nightingale v. Marshall* (c); *The Queen v. Savage* (d); *The Queen v. Ruxton* (e).

It was not compulsory on the Guardians to adopt the revised valuation list as the basis of a rate until thirty days had elapsed from the date of the signature of the list: 15 & 16 Vic., c. 63, s. 32. That period had not expired when Mr. Lanyon ceased to occupy No. 14 Wellington-place on the 1st of May 1862.

(a) 6 H. of L. Cas. 106.

(b) 6 B. & Cr. 475.

(c) 2 B. & Cr. 313.

(d) 3 Ir. Law Rep. 480.

(e) *Ibid.*, 478, note.

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The case of *Miller v. Salomons* (a) decided that the intention of the statute was to be followed; for the words "on the true faith of a Christian" were of the substance. *The Queen v. Savage* (b) is to the same effect, because no rate had there been struck; and the language of the statute, that a rate should exist, was positive. The decision in *Nightingale v. Marshall* (c) was based on the impossibility of carrying out the intention of the Act; while in *Gilman v. Crowley* (d) the Court thought that the mere similarity of the words would not warrant them in substituting "release" for "lease."

Beneficial occupation is the test by which to determine the question, whether an occupier is liable to pay rates. A man who derives benefit from the occupation of premises is liable to pay rates, even though the premises themselves are exempt from such liability: *The Queen v. Ponsonby* (e). It is argued that the applicant's occupation was not "successive," because the counting-house was not separately rated as such antecedently to the date of the notice of claim. But the rating and occupation need not be co-extensive in point of time, nor continue throughout the whole year. Section 30 does not require the premises to have been of the specified value during each moment of the year. On the 31st of August 1862, the applicant produced the rating of the 25th of June preceding, at both of which times the counting-house was rated as such, separately from every other building, to the requisite value which had been put on it prior to the 1st of May 1862; so that he then possessed all the qualifications required by section 30. Residence or occupation for a year, and adequate value, are the essential requisites; but to refuse this motion would be to interpolate into the section the words, "and rated during twelve months." The mode of proving that the premises are of adequate value is quite distinct. If the rate of 1861 and that of 1862 show the counting-house to be of adequate value, the

(a) 7 Exch. Rep. 549, 551.

(b) 3 Ir. Law Rep. 480.

(c) 2 B. & Cr. 313.

(d) 7 Ir. Com. Law Rep. 557.

(e) 3 Q. B. 14.

applicant's right is established.—[FITZGERALD, J. How can we see, from the rate of 1861, that the value was adequate?—Both rates show that the applicant occupied premises of adequate value, at the time when each rate was made; and that, during every moment of the intervening year, the rate covered the premises in respect of which the claim is made.

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It is said that, under section 33, the rating must be shown to have existed before the commencement of the occupation. But that section does not contemplate such a thing as rating apart from occupation. The premises need not be rated *in nominibus*. Section 33 contemplates a case in which the house does not appear in any rate at all; and the words, "shall or ought to include such premises," show that a man, who comes into possession of premises of adequate value, may, after the lapse of twelve months, entitle himself to the franchise, not in respect of a future rate, but of the rate *for the time being*. The words, "shall be deemed to have been rated," are clearly retrospective.

The revised valuation was in operation at the time when the notice of claim was served: and its new rating on this particular isolated tenement was as complete as the new rating of the entire union was after the 25th of June.

Counsel cited *Alexander's case* (a).

Cur. ad. vult.

HAYES, J.

After the best consideration that we have been able to give to this case, dictated by a full sense of its importance, we have come to the conclusion that the conditional order for a *mandamus* ought to be discharged.

Nov. 24.

The question is one of pure law; resting upon a few simple, well-ascertained, and undisputed facts.

At the time of striking the rate of the 25th June 1861, in the borough of Belfast, Mr. Lanyon was the occupier of a dwelling-house in Wellington-place in that town, with outbuildings extending to Upper Queen-street. In that rate, he was rated for those pre-

(a) 5 Ir. Com. Law Rep. 43.

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mises in Wellington-place and Upper Queen-street, at £114 per annum. He continued to occupy all until the 1st of May 1862. He then retired from the occupation of the dwelling-house, having demised it to a Dr. Strong; and from thenceforward he lived at a place called "The Abbey," some three or four miles from Belfast. The buildings, which fronted to Upper Queen-street, were then separated from the Wellington-place premises; and were thereafter occupied as a counting-house by Mr. Lanyon and his two copartners in business.

On the 25th of April 1862, and before the setting to Dr. Strong, the final lists of the tenement valuation, under the 15 & 16 *Vic.*, c. 63, were received by the Belfast Guardians; in which the premises in Wellington-place were disunited in valuation from those in Upper Queen-street; the former being put down as of £90 per annum value, and the latter of £30 per annum. On the 24th of June, after the changes in occupation which I have mentioned had taken place, Mr. Lanyon served the Guardians with a claim to be rated; which, though very inaccurately framed, I am willing to take, for present purposes, to have been a claim to have his name put on the current rate, as one of the joint-occupiers of Queen-street premises alone, and to the amount of £10 per annum for his share; it being ascertained that no rate was then due in respect of those premises. This claim was not complied with; and, on the 25th of June, a new rate was struck, in which Mr. Lanyon's name appears as one of three joint-occupiers of the Queen-street premises, rated at £30, pursuant to the new tenement valuation, and according to which the Guardians were bound to act in making the rate.

At the last revision of the burgess-roll, the name of Mr. Lanyon having been objected to, was, after full consideration of his case by the Court below, struck off the burgess-lists; and from that decision he appeals.

Upon this state of facts, it has been argued, by Mr. Lanyon's Counsel—first, that, upon the true construction of the 3 & 4 *Vic.*, c. 108, s. 30, and without at all resorting to section 33, Mr. Lanyon's name ought to have been retained. We are clearly of opinion that no such right can be maintained. Under the 30th section, the

party must show, not merely that he was in occupation of premises within the borough, for a period of twelve months prior to the last day of August, but also that the premises (whether the same premises throughout, or different premises occupied in succession) were, during the whole period of his respective occupation, rated to the relief of the poor; and that to an amount not less than £10, as evidenced by the rate-book for the time being in force. Now, passing over the period during which Mr. Lanyon was in occupation of the two sets of premises, there is no legal evidence whatever that from the 1st of May to the striking of the rate of 25th June 1862, Mr. Lanyon occupied, within the borough, premises rated at £10 per annum: and we hold that to be a fatal defect. The rate of 25th June 1862 was good evidence of the value at that day, and so long after as it continued in operation; but was no evidence of the value at any antecedent period. It appears to us therefore that the right of Mr. Lanyon cannot be sustained, merely on the 30th section.

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But then it is argued, *secondly*, by his Counsel, that any doubt which might thus exist is completely removed when the 33rd section and the Tenement Valuation Acts are called in aid. That 33rd section enacts that it shall be lawful for any person occupying any house, &c., in a borough, to claim to be rated to the relief of the poor in respect thereof; and upon his so claiming, and actually paying or tendering to the proper officer the full amount of the last-made rate in respect of such premises, "the Guardians, or other persons charged with making any rate for the relief of the poor, which shall or ought to include such premises, are hereby required to put the name of such occupier upon the rate for the time being;" and in case of neglect or refusal so to do, "such occupier shall nevertheless, for the purposes of this Act, be deemed to have been rated to the relief of the poor in respect of such premises, from the period at which the rate shall have been made in respect of which he shall have so claimed to be rated, as aforesaid."

The section, so far as I have read, prescribes a duty to the Guardians, and enacts that a certain consequence shall follow if

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that duty be neglected; and all this with a view to secure to the party a remedy for the omission of his name from the current rate. The question then arises, was it the duty of the Guardians, on being served with the claim, to have complied with its requisition? for if not, it can hardly be contended that the service of this claim ought to have the effect mentioned in the Act. On the one hand, it is insisted that it was the duty of the Guardians, on the 24th of June, when served with the claim, at once to have availed themselves of the tenement valuation, which was then in full force within the borough, and to have put the name of Mr. Lanyon on the rate, as a co-occupant of the Queen-street premises, with a value annexed to them of £30; while, on the other side, this is denied. We are of opinion that no such duty arose.

When the statute speaks of tendering "the last made rate then payable in respect of such premises," it plainly assumes that those very premises (and not those combined with others) had been rated at a certain sum in that rate; and that thus the statutory evidence of value was supplied. But no such thing was done here. It was wholly impossible to ascertain, from the rate of 1861, the value of the Queen-street premises. It is then said that that value, if not to be ascertained from the rate-book in its then condition, might and ought to have been ascertained by a reference to the tenement valuation which was in force at the time the claim was served, and that the rate-book ought to have been made conformable. But the answer to that is twofold—first, no authority was given to the Guardians, by the Tenement Valuation Act, to refer to that valuation for any such purpose. It was to be in force for the making of future rates, and thus imposing a tax upon the subject; but nothing of that kind was to be done here. It was not intended, by Mr. Lanyon's claim, that a tax should be imposed upon him; but merely that evidence should be supplied, by the rate-book, that he was the party who had been liable to pay a certain tax already charged, and which had been discharged by him. Secondly, the statute only directs the Guardians "to put the name of the occupier upon the rate for the time being," while the notice of claim desires them to do a great deal more—viz., to segregate the Queen-street

premises from the Wellington-place premises, and to affix a value to the former, which there was no authority whatever for assigning to them at the time that rate was originally struck ; so that, if complied with, there would have been an unauthorised falsification of the document in those several particulars.

In conformity therefore with the opinions of two Members of this Court, who decided the case of *Wauchob v. Reynolds (a)*, and whose names will always command the respect both of Bench and Bar, we hold that no authority has been given to the Guardians, by either or both of the statutes referred to, to make any alteration in the rate-book, saving the putting on the name of the party occupant, when that name has been omitted from the rate.

For these reasons, I am of opinion, that the *mandamus* now sought for ought not to issue.

FITZGERALD, J.

I have arrived at the same conclusion as my Brother HAYES, and for very much the same reasons. It would have gratified me if I could have adopted that construction of the 30th section for which the applicant contended ; as the effect would have been to enlarge the basis of the municipal franchise. However, I have found it impossible, without doing violence to the words of the statute, to arrive at any decision other than that which my Brother HAYES has pronounced. From the moment when I heard the case fully opened by Mr. *Whiteside*, and the facts brought before us, I did not entertain any doubt as to the conclusion at which I ought to arrive ; and, as the decision of the Revising Officer below was, during the argument, treated with some derision, I think it right to say that, in my opinion, that decision was founded upon the true principles of construction, and is in accordance with, and fortified by, principle and precedent.

My learned Brother has put the case so clearly on its true foundation, that I do not find it necessary to go so much at large into the reasons for my judgment as I had intended.

It has never been doubted, since the 3 & 4 *Vic.*, c. 108, became

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law, that, on the true construction of its 30th section, certain requirements must be fulfilled in order to qualify a man to be enrolled as a burgess—that is to say, occupation for the twelve calendar months next preceding the last day of August, of premises actually rated to the relief of the poor at the annual rated value of £10; and the section requires, in addition, rating by name. The rating, and rated value are to be ascertained from the rate-book, from which it must appear that the premises in respect of which the qualification arises were, during the whole period of twelve months, of the rated value of £10.

The claim which the appellant makes is founded on successive occupation. He was the sole occupier of premises of the required rated value, from the 31st of August 1861 to the 1st of May 1862, when he parted with his occupation; and the simple question is, whether he then acquired, by immediate succession, such an occupation of another tenement as entitled him to the municipal franchise?

On the 1st of May 1862, Mr. Lanyon became, jointly with two others, occupier of premises which never, up to that time, had been rated as a separate tenement to the relief of the poor, and which were not on any rate-book. If the premises had been at that time on the rate-book as a separate tenement, and appeared there to be of sufficient rated value, the applicant would have made out his title to be enrolled as a burgess, by successive occupation; but he fails to make out his title, because the subject of his new occupation had not been, *as such*, on the rate-book prior to, or on, the 1st of May 1862, and there were no means of ascertaining from the rate-book its value. The Tenement Valuation Act (15 & 16 Vic., c. 63) has not any real application. It is merely to be looked to as the foundation of any new rate to be made; and it is only as the foundation of any new rate that the Poor-law Guardians were bound to adopt it: it has no retro-active operation.

But, the premises in Queen-street having been rated jointly with those in Wellington-place, and having been in that way on the rate-book rated for the space of twelve calendar months next preceding the 31st of August 1862, the applicant's Counsel argued that the

true construction of the 30th section of the 3 & 4 *Vic.*, c. 108, was, that if the party appeared by name as a rated occupier upon the last rate which had been made anterior to the period of revision, the 31st of August in any year, and the tenement then appeared on that rate to be of the full rated value, these qualifications gave a title to the franchise, if there had also been occupation for twelve calendar months immediately preceding the 31st of August. In reference to that argument, I stated originally that I would have been glad to adopt the construction contended for, if I could have done so possibly, consistently with the language of the 30th section; because it would enlarge the municipal franchise, and place it on the same basis as the Parliamentary franchise. But it appears to me that the Legislature has not said so, but has said the contrary. Such a construction never has been put on section 30 of the Municipal Act; on the contrary, the uniform construction has been that, for the purposes of the municipal franchise, a rating of the tenement itself out of or in respect of which the franchise is claimed, must have existed to the extent of £10 per annum during the whole period of the required occupation—namely, twelve calendar months immediately preceding the 31st of August 1862. When the Legislature intended something different, it expressed the difference; and accordingly I find that, in the 13 & 14 *Vic.*, c. 69, when the Legislature intended that such should be the basis of the electoral franchise, it said so in express terms; and our Parliamentary Registration Act, in its first section, enacts that the claimant of the franchise must have been the occupant, as tenant or owner, for twelve calendar months next before the 9th of November, of lands or tenements rated to the relief of the poor to the annual value of at least £12; and that the rated value shall be ascertained “*under the LAST rate for the time being,*”

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The language of the 13 & 14 *Vic.*, c. 69, is so express, that one wonders how the question could have arisen in *Alexander's case* (a). Again, when we refer to the code of Municipal Corporation Acts, beginning with the 5 & 6 *W.* 4, c. 76, down to the 6 & 7 *Vic.*, c. 93, we find different franchises provided for in different terms; the

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6 & 7 *Vic.* is an Act amending the 3 & 4 *Vic.*, c. 108; and in its 12th and 13th sections, when providing for a more limited franchise in reference to towns coming under the 9 *G.* 4, c. 82, requires only occupation of tenements which (under the *last* rate) shall be valued at £5 a-year. But in the same code it requires rating by name and for twelve calendar months at the rated value of £10 per annum: when dealing with elections for corporations generally, and for town commissioners, it requires the voter to be rated under the *last* rate, to the value of £10 per annum. In fact the 30th section of the 3 & 4 *Vic.*, c. 108, is in exact accordance with the pre-existing Municipal Corporation Act in England (5 & 6 *W.* 4, c. 76, s. 9), in which it will be found that, though rating and occupation for a period of three years are there required, it also provides that during the whole time of occupation he shall have been rated to *all* rates made during that period for the relief of the poor; and our Municipal Act follows that in terms, except that the period of rating and occupation is altered. In all other respects the enactments are the same. It appears to us therefore that the applicant's case has so far failed.

But then a claim is rested on the 33rd section of the 3 & 4 *Vic.*, c. 108, which it is said has supplied the defect, if any, which existed in the applicant's title under section 30; and that, although it is proved that the tenement in Queen-street had not been rated as a separate tenement, and that Mr. Lanyon was not named in the rate-book in respect of it, yet that, his claim being made under the 33rd section, the defect was supplied. The notice of claim to be rated was brought before us; and, even if the 33rd section applied to this case, I would have entertained considerable doubt whether this would have been a sufficient claim to be rated within the meaning the 33rd section, although I am not willing to give force to any technicality. The error fallen into on the part of Mr. Lanyon or his advisers was, that they took up a section (110) of the Parliamentary Registration Act (13 & 14 *Vic.*, c. 69), which provides in express terms for the case where the name has been omitted from the rate-book, although the tenement has been rated to the proper value. That section enables the party whose name

has been omitted to point out, by notice, the omission of his name; and places on the Guardians the duty of correcting the error, by putting the name which has been omitted on the rate with respect only to the proper tenement; and accordingly Mr. Lanyon's notice states that the rate had been made, and the tenement rated at £30 per annum; that his name had been omitted from the rate, and requires the Guardians to insert his name.

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I have arrived at the same conclusion as my Brother HAYES, that, without resting at all on the insufficiency, if any, of the notice, the 33rd section does not apply to this case. That section has already received a judicial construction in the case of *Wauchob v. Reynolds (a)*, and in that decision, which has ever since been acted on, I concur. The 33rd section does not make it the duty of, or empower, the Guardians to strike a new rate, or a supplemental rate, or to alter any of the figures on the rate, for that would be disturbing the whole rate. When the name of a party duly rated has been omitted, in respect of a rated tenement, or an untrue name has been inserted which ought to be expunged, or any other case of substitution of names properly arises, the 33rd section authorises the Guardians, and imposes on them a duty, when a claimant establishes a *bona fide* claim to be put on the rate, and pays up all rates due, either to insert in the rate-book the name of any such applicant whose name had been omitted, or to substitute the true name for that which has been untruly inserted; or in the case of successive occupation, to substitute the name of the real occupant. But all the authority or duty which the Guardians have is to substitute one name for another, or to insert one which has been omitted. Now that would not have served Mr. Lanyon's purpose. He failed here because the tenement in respect of which he claimed never had been separately rated. There was no omission in respect to his name, nor any error; for his name was not upon anything, nor was there any name for which his could be substituted. Therefore it is obvious that no duty devolved on the Guardians under the 33rd section.

The 6 & 7 Vic., c. 93, s. 27, provides for cases which do not

(a) 1 Ir. Com. Law Rep. 142.

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come within the 3 & 4 *Vic.*, c. 108, s. 33; and provides for them in emphatic language. It recites (*inter alia*):—"Whereas doubts have arisen how far any misnomer or inaccurate or insufficient description in a rate of the person occupying any such premises as in the said recited Act are mentioned, or any inaccurate description of the premises so occupied, has the effect of preventing any such person from being enrolled as a burgess and entitled to vote in respect of such premises in any year;" and then authorises a proceeding by which any misnomer or insufficient description may be cured.

Again, upon referring to the 13 & 14 *Vic.*, c. 69, s. 110, under which, in point of fact, Mr. Lanyon's notice seems to have been given, I find that it authorises any person who is the occupier of property, which would give him the franchise and which has been rated to the relief of the poor, *if his name has been omitted from the rate*, to present a claim to the Guardians to be rated; and it then becomes their duty to insert the name of the party on the rate. If they decline to do so, he is to be deemed in the same position as if the Guardians had performed the duty of inserting his name on the rate. But they have no further or other authority than to insert his name on the rate.

Upon these grounds, I concur in the judgment of the Court.

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Exchequer.

COLTSMAN v. COLTSMAN.*

(Exchequer.)

Jan. 25, 26.
 Dec. 5.

THIS was an action of ejectment on the title, brought by Catherine Coltman, widow of John Coltman the younger, against Daniel Cronin Coltman. The action was tried before Monahan, C. J., at the Summer Assizes for the county of Kerry, 1863. It appeared that John Coltman the elder, who had been seised of Flesk Castle in *quasi* fee, under a lease for lives renewable for ever, and of Dicksgrove in fee, died in 1835, having made his will and codicil thereto, set forth below. He left surviving him his widow, John Coltman the younger (his only son), and a daughter Mary, married to Sir William D. Godfrey; another daughter, Christina, who had married Daniel Cronin the younger, had died in the lifetime of the testator, leaving issue, of whom the defendant, Daniel Cronin the younger, who afterwards took the name of Coltman, was the eldest. John Coltman the younger, shortly after his father's death, executed disentailing deeds of both the above denominations. He died on the 15th of January 1849. By his will, after giving some small legacies, he devised "all the residue of his real and personal estate" to his wife Catherine Coltman, the plaintiff in this action.

A testator, seised of lands in fee and *quasi* fee, by his will devised "all his property, lands, tenements and premises," at and about the the two denominations, and his plate, library, pictures, and furniture, to A. He directed an annuity to be paid to his wife "out of the rents, issues, dividends, interest and profits of my said estates." By a codicil, the testator directed that, "if it should happen that my son A die without heirs of his body lawfully begotten, or to be begotten, in

that case, and in default of such heirs," then his lands of both denominations, charged with the annuity to his wife, and with any reasonable provision A should make for his wife, should, at A's death, descend to his grandson D, who was to take the testator's name in addition to his own. The codicil also declared that, in case of A's death without heirs of his body lawfully begotten or to be begotten, in that case, and in default of such heirs, the testator gave the sum of £6000 to his daughter M. A entered into possession on the testator's death, executed disentailing deeds of both denominations, and died without ever having had issue.—*Held*, that, under the above devise, A took either an estate for life, or in fee, in both denominations, with an executory devise over to D in fee.

* *Coram* FROST, C. B., and HUGHES, B.—[FITZGERALD, and DEASY, BB., had given opinions upon the case when at the Bar].

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At the trial, his Lordship directed a verdict for the defendant, reserving leave to the plaintiff to move to enter the verdict for her. The will of John Coltsman the elder, upon which the case turned, ran as follows:—"In the name of God; amen.* I, John Coltsman, "of Fleak Castle, near Killarney, in the county of Kerry, gentle- "man, being of sound and disposing mind and understanding, do "make and publish this my last will and testament, in manner "following—First; I give, devise and bequeath to my son John "Coltsman all those my property, lands, tenements and premises, "at and about Fleak Castle, together with the live stock on said "lands; also my plate, library, pictures and furniture. I also "devise and bequeath to my son John Coltsman my lands, tene- "ments and premises, with the appurtenances thereof, situate, lying "and being at Dicks Grove, near Castleisland, county of Kerry. "I give and bequeath to my son John Coltsman the money I have "at interest in the lands and estates of Daniel Cronin, my son- "in-law, also the money I have at interest in the lands and estates "of the late Daniel Cronin, his father (the bonds I think are signed "by father and son aforesaid). I also make over and assign to "my son John Coltsman the bond I have of Lord Kenmare for "the sum or bond of £500 sterling. I also give and bequeath "to him the sum of £500 sterling, lent by me at interest to my "son-in-law, William D. Godfrey. I give and bequeath to my "son John Coltsman my lands and premises at Caleza de Mon- "tacheque, a few miles from Lisbon; I also bequeath and assign "to him my title and claim to some houses and lands situate "and lying in New-lane, near the South Catholic chapel, in the "city of Cork, the property of the late Doctor Walsh; but which "houses and lands aforesaid the son of the said Doctor Walsh "promised to transfer and assign to me, in payment of a debt "which his father owed me at his death.—I give and bequeath "to my dear wife Christina Coltsman the yearly sum or annuity "of £700 sterling, during her natural life, and for her own use "and benefit, in lieu for and instead of all other provisions made "for her upon or previous to our intermarriage; said annuity to

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"be paid and payable (into her own hands) *out of the rents, issues, dividends, interest and profits of my said estates*, by half-yearly payments, on the 25th day of March and the 29th day of September in every year, by even and equal proportions; the first payment of the same to begin and be made on such of the said days as shall first happen after my decease: the said annuity to be also paid or payable clear of all taxes and deductions whatsoever. I also give and bequeath to my dear wife Christina Coltsman, the further sum of £1000 sterling, to be paid to her out of my said estates, at the end of the year next after my decease, for her own use and benefit. I also bequeath to my dear wife Christina Coltsman, during her natural life, such part or portion of the said plate as she may think proper for her own use, and to be returned at her decease to my son John Coltsman, his heirs, executors and assigns. I also give and bequeath to her our best carriage and carriage-horses, and desire that she shall have sufficient good and suitable furniture for the rooms she may prefer in Flesk Castle for her own use. I bequeath to my daughter Mary Godfrey the sum of £300, to be placed in the funds for her own use and benefit, and so as that the said sum of £300, or any part of it, shall not be liable to the debts, engagement, management or control of her husband. I give to my son-in-law Daniel Cronin the sum of £100 sterling; also to my son-in-law William D. Godfrey the like sum of £100 sterling. I, moreover, give and bequeath to my dear wife Christina Coltsman whatever part or portion of the household linen she may think proper for her own use, and also desire that she may have the disposal of by will of the £1000 before mentioned (and bequeathed in this will to her), at any time she may think proper after my decease. I also hereby constitute and appoint my beloved Christina Coltsman executrix, and my son John Coltsman executor, of this my last will and testament; hereby revoking and annulling all former and other wills and testaments by me at any time heretofore made."

"In witness whereof I have, to this my last will and testament,

H. T. 1864. "set and subscribed my hand and seal, 9th day of August 1833,
Exchequer. " &c., &c.—John Coltsman."

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The testator made the following codicil:—"Whereas I, John Coltsman, of Flesk Castle, near Killarney, in the county of Kerry, gentleman, have made and duly executed my last will and testament in writing, bearing date the 9th day of August 1833; now, I do hereby declare this present writing to be a codicil to my said will, and I do direct the same to be taken as a part thereof. And I do hereby give and bequeath to my dear wife Christina Coltsman, in my said will named, the further yearly sum of £100, in addition to the annuity I have bequeathed to her in my said will, to be paid and payable into her proper hands, out of the rents, issues and dividends, interest and profits of *all my said estates*, by half-yearly payments, in the manner and at the times specified and declared in my said will. I also do hereby give and bequeath to my brother-in-law, John Lassener, the sum of £100. *And if it should happen that my son John Coltsman die without heirs of his body lawfully begotten, or to be begotten, in that case, and in default of such heirs*, I do hereby devise and direct that my lands, castles, tenements and premises, at and about Flesk Castle, and mentioned in my said will, together with the plate, furniture, and library, in said will specified, also my *lands*, farms, tenements and premises, situate, lying and being at Dicksgrove, near Castleisland, *all* subject to and *charged with* the payment of the aforesaid annuity, to my dear wife, of £800 a-year, *and also with the payment of any reasonable provision made, with my consent, by my son for his wife*, to be paid and payable to her during her natural life, *shall, at my son's death, descend* and be transferred to my grandson Daniel Cronin, his heirs, executors and assigns, for ever; the heir for the time being to add the name of 'Coltsman' to the name Cronin. Also, if it should happen that my son John Coltsman die *without heirs of his body lawfully begotten or to be begotten, in that case, and in default of such heirs*, I do hereby give and assign, out of the moneys I have at interest, and specified in my said will, the sum

of "£6000 to my daughter Mary Godfrey, for her own use and benefit, and so as that the said sum of £6000 shall not, nor shall any part of it, be subject or liable to the debts, engagements, management or control of *her husband*; but, at the same time, said sum of £6000 shall *be subject to and charged with the payment of the said annuity to my dear wife Christina Coltsman*. I do hereby give and bequeath to the Reverend Thomas Dunne, Catholic curate of Killarney, the sum of £50, as a testimony of my esteem. I do hereby constitute my daughter Mary Godfrey, and my son-in-law Daniel Cronin, joint executors with those already constituted by me in my said will; and I do hereby ratify and confirm my said will in all other particulars thereof.—In witness whereof, I, the said John Coltsman, have to this codicil set my hand and seal, this 6th day of December 1853."

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A conditional order, pursuant to the leave reserved, having been obtained by the plaintiff Mrs. Coltsman—

The *Solicitor-General*, Serjeant *Sullivan*, *C. Barry*, *J. Leahy*, and *H. P. Jellett*, now showed cause.

John Coltsman the younger took estates in fee and in *quasi* fee, with an executory devise over in case of his death without issue. The devise over in the codicil points to a failure of issue at the death of John Coltsman the younger, not to an indefinite failure of issue. Daniel Cronin, now Coltsman, the defendant, took an estate in fee in Fleak Castle, and in *quasi* fee in Dicksgrove, upon the death of John Coltsman the younger in 1849. That it was the intention of the testator to create the above limitations appears from, first, the proviso that Daniel Cronin should take the name of "Coltsman" upon the devolution of the estates upon him, in the event of the death of John Coltsman the younger without heirs of his body; secondly, from the gift to Mary Godfrey of £6000 upon the same event.

The words of the codicil—"If it should happen that my son John Coltsman die without heirs of his body lawfully begotten, or to be begotten, in that case, and in default of such"—must be construed

H. T. 1864. in the restricted sense of "issue living *at* his death: *Wilkinson v. South* (a); *Roe d. Sheers v. Jeffrey* (b); *Roe d. King v. Frost* (c); *Ex parte Davies* (d); *Parker v. Birks* (e); *Nichols v. Hooker* (f).

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COLTSMAN. From these authorities, the rule of construction to be observed is, that the words "*at* the death," "*on* the death," and "*upon* the death," of a devisee "without issue," will have the restricted meaning of issue living at the death of the devisee; and in the cases above cited the first devisee took an estate in fee with an executory devise over. Not so, when the words "*after* the death of" occur; there the first devisee takes an estate tail: *Jones v. Ryan* (g). Yet where there was a direction that the executory devisee should pay a certain sum, in case the estate devolved upon him—like the gift of £6000 here to Mary Godfrey,—the latter phrase was, by reason of that condition, held to give an estate in fee, with an executory devise over: 2 *Jarman on Wills*, p. 492. The words "heirs of the body" here are to be treated as the word "issue" was in *Johnson v. Johnson* (h): as "child or children" were in *Doe d. Smith v. Webber* (i). The words of description are immaterial; the essential point is the "time" of failure of issue. A third ground for the construction above given is, that the testator, who was possessed of fee-simple, freehold and chattel property, comprised them all in the same clause, and devised them all to Daniel Cronin the defendant.

So far as to the construction of the will and codicil. As to the estate taken by John Coltsman the younger in the respective denominations, Dicks Grove was held in fee, Flesk Castle under a lease for lives renewable for ever. The testator has used the largest word of gift known to the law before the passing of the Wills Act, *i. e.*, "property:" *Roe v. Pattison* (k). John Coltsman therefore, under the will, took an absolute estate in fee in Dicks Grove. As to Flesk Castle his absolute estate is not so manifest until the gift of annuity

(a) 7 T. R. 555.

(c) 3 B. & Ald. 546.

(e) 1 K. & J. 156.

(g) 9 Ir. Eq. Rep. 249.

(i) 1 B. & Ald. 713.

(b) 7 T. R. 589.

(d) 2 Sim., N. S., 114.

(f) 1 P. Wms. 198.

(h) 8 Exch. 81.

(k) 16 East, 221.

of £1000 to the wife of the testator, out of his *said estates*, i. e., Flesk Castle and Dicksgrove. The gift of that annuity, out of both the estates, shows the testator's intention that both estates should pass absolutely to the person who was to bear the burden of that annuity. It cannot be contended that the testator intended to give to his heir-at-law a life estate, and to make him take by purchase, and not by descent: *Uthwatt v. Bryant* (a).

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D. C. Heron and *John O'Hagan*, in support of the conditional order.

The present case differs from all those cited by the defendant's Counsel. First, in the fact that in every case cited an express estate in fee-simple was given to the first taker: secondly, because in none of the cases cited do the words "heirs of the body" occur: and, thirdly, because in those cases there is no gift over "in default of such heirs," i. e., "heirs of the body." The word "estates" in the will and codicil must, from the context, be taken as descriptive only. It is not contained in the clause bestowing Flesk Castle and Dicksgrove upon John Coltsman the younger; and if used to convey "an interest" where it first appears, it is clearly descriptive when next used, viz., in the annuity clause: 2 *Jarman on Wills*, pp. 256, 257; *Randall v. Tuchin* (b); *Doe d. Bates* (c). The word "property" has not here the extensive meaning which was given to it in *Roe v. Pattison* (d); for here it cannot be more extensive than the testator's "land, &c., &c., at and about Flesk Castle."

The 29th section of the Wills Act (7 W. 4, and 1 Vic., c. 26), does not allude to the use of the words "heirs of body," as the Legislature assumed that when, as here, those words are used, an estate tail was intended to be given. John Coltsman the younger took an estate tail under the will and codicil: *Wyld v. Lewis* (e); *Lee's case* (f); *Walter v. Drew* (g); *Forth v. Chap-*

(a) 6 Taunt. 317.

(c) 16 East, 221.

(e) 1 Atk. 432.

(b) 6 Taunt. 141.

(d) 16 East, 221.

(f) 1 Leon. 285.

(g) Comyn, 372.

H. T. 1864. *man*(a); *Daintry v. Daintry* (b). These cases turned upon the death of the first taker without "issue," but that word in a will is the same as "heirs of the body" in a deed: *Doe v. Holmes* (c); COLTSMAN *Doe d. Todd v. Duesbury* (d); *Machell v. Weeding* (e); *Simmons v. Simmons* (f); *Jones v. Ryan* (g); *Moriarty v. Grey* (h); COLTSMAN. *Doe d. Cole v. Goldsmith* (i). There, as here, "heirs of the body" was the phrase used: *Broadhurst v. Morris* (k); 2 *Tudor's Leading Cases on Real Property*, p. 588; *Lithieulier v. Tracy* (l); *Newton v. Barnardine* (m); *Jesson v. Wright* (n); *Doe d. Cole v. Goldsmith* (o); *Dunk v. Fenner* (p). There are no words in the will or codicil to give more than an estate for life to John Coltsman in Dicks Grove; therefore he took an estate tail in that denomination. "Heirs of the body" are not synonymous with "issue:" *Rex v. Milling* (q); *Prior on Issue*, s. 34; *Ex parte Wynch* (r). The estates tail were barred by the disentailing deed, therefore the plaintiff is entitled under her husband's will.

Serjeant *Sullivan*, in reply.

Flesk Castle passed absolutely to John Coltsman the younger, in accordance with a chain of decisions: *Doe d. Booley v. Roberts* (s); *Lord Londesborough v. Somerville* (t); *Benton v. White* (u). "Property" passes the whole interest: *Casey v. Lawlor* (v); *Plunkett v. Holmes* (w); *Doe d. Barnfield v. Welton* (x). There is a leaning in favor of the words in the codicil being construed to

(a) 1 P. Wms. 663; S. C., *Tudor's L. C. on Real Property*, 552.

(b) 6 T. R. 307.

(c) 3 Wils. 245.

(d) 8 M. & W. 514.

(e) 8 Sim. 4.

(f) 8 Sim. 22.

(g) 9 Ir. Eq. Rep. 249.

(h) 12 Ir. Com. Law Rep. 129.

(i) 7 Taunt. 209.

(k) 2 B. & Ad. 1.

(l) 3 Atk. 796.

(m) Moore, 127.

(n) 2 Bligh, 1.

(o) 7 Taunt. 209.

(p) 2 B. & Myl. 557.

(q) Ven. 225.

(r) 5 De G., M. & G. 188.

(s) 11 Ad. & E. 1000.

(t) 19 Beav. 295.

(u) 7 Exch. 720.

(v) 7 Ir. Jur. 245.

(w) 1 Lev. 11.

(x) 2 Bos. & Pul. 324.

mean a definite, and not an indefinite, failure of issue: *Doe d. Johnson v. Johnson* (a). H. T. 1864.
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PIGOT, C. B., now delivered judgment.

This was an ejectment on the title, brought by the widow and devisee of John Coltsman the younger, to recover two denominations of lands—Flesk Castle, held for lives renewable for ever, and Dicksgrove, held in fee. M. T. 1864.
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It appeared at the trial that these lands belonged to John Coltsman the elder; and that by his will, dated the 9th of August 1833, and by a codicil to that will, dated the 6th of December 1833, he made certain dispositions of both denominations, which I shall now state.—[Here the LORD CHIEF BARON read the devises contained in the will and codicil.]—The testator, John Coltsman the elder, died in 1835, leaving, surviving him, his widow, John Coltsman the younger his only son, and a daughter Mary, married to Sir William Duncan Godfrey. He had another daughter, Christina, who died in his lifetime, who had been married to Daniel Cronin the elder, and who left children, of whom Daniel Cronin the younger, the defendant in this ejectment, was her eldest son.

John Coltsman the younger, shortly after his father's death, executed two disentailing deeds, each dated the 7th of July 1835, one comprising Dicksgrove, and the other comprising Flesk Castle. Under these deeds, and a deed of reconveyance from a trustee of Flesk Castle, dated the 8th July 1835, John Coltsman the younger would have become the absolute owner *quasi* in fee of Flesk Castle, and the owner in fee of Dicksgrove, if, under his father's will, he took an estate *quasi* in tail in the former, and an estate tail in the latter denomination of land.

John Coltsman the younger, by his will, executed long subsequent to the disentailing deeds, and dated the 7th August 1848, devised all the residue of his estate, real and personal, to his wife Catherine Coltsman, the plaintiff in this ejectment. He subsequently died; and this ejectment was brought by his widow, claiming

M. T. 1864. "out of the rents, issues, dividends, and profits of *my said estates*." *Eschequer*.
 COLTSMAN v. COLTSMAN. In another clause he gave and bequeathed to his wife a further sum of £1000, "to be paid to her out of *my said estates*, at the end of the year next after my decease, for her own use and benefit." It was contended that those clauses were within the principle of several authorities (many of which were cited at the Bar, and two of the latest of which are *Blinston v. Warburton* (a) and *Mathews v. Windross* (b), holding that where the devisee, named in an indefinite devise containing no words of inheritance, and no equivalent words, is directed to pay, either personally or out of the estate devised to him, debts or legacies, the devise is to be treated as a devise in fee. In neither of these two clauses of the codicil, thus relied on by the defendant's Counsel, was the devisee directed to pay any of the charges. These clauses do no more than make the annuity and the legacy payable *out of the lands*, on whomsoever the lands may devolve; and that is precisely the kind of provision which, in several decided cases, has been determined not to have the force of giving to the indefinite devise the effect of a devise of the fee. The cases on this subject are collected in 2 *Jarm. on Wills* (last ed.), pp. 248, 249. I shall only refer to two of the latest—*Vick v. Sueter* (c) and *Burton v. Powers* (d); which clearly lay down the rule, and illustrate the distinction between the two classes of provisions creating charges of this nature—namely, those which do, and those which do not, give to an indefinite devise the import of a devise in fee. It was further contended, on the part of the defendant, that the use of the words "*said estates*," in those two provisions, shows that the testator, in the devises of the lands, intended to transfer the whole interest in each denomination. This argument is answered by those authorities in which it has been held that where the word "*estates*" is used, not in the operative clause of the devise comprising the words of gift, but in some other part of the will, although in connection with the *names* of the *lands* which are devised by the operative clause, that alone will not have the effect of extending the meaning of such clause, and of

(a) 2 Kay. & John. 400.

(b) 2 Kay. & John. 406.

(c) 3 Ell. & Black, 219.

(d) 3 Kay. & John. 170.

converting an indefinite devise into a devise for a larger estate than an estate for life. *Doe v. Clayton* (a), and two recent cases, *Doe v. White* (b), and the case before referred to for another purpose, *Vick v. Sueter* (c), expound and illustrate this rule.

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For these reasons, I am of opinion that if we had now to deal with the devises of Flesk Castle and Dicksgrove, in the terms in which those devises appear in the will, even in connection with the pecuniary charges created by the codicil, we ought to hold that the devise of Flesk Castle would have passed the testator's whole estate and interest; and that the devise of Dicksgrove gave a life estate only to John Coltsman the first devisee.

We have next to consider the codicil. It confirms, and in express terms incorporates, the will. It first provides an annuity of £100 a-year for the testator's wife, for her life, in addition to the £700 a-year previously charged for her in his will; and it directs that additional annuity to be paid "out of the rents, issues, dividends, interest, and profits of all my said estates;" those estates not being previously named in the codicil, though of course being sufficiently designated by the will. The codicil then proceeds to deal with Flesk Castle and Dicksgrove, in one and the same clause, and in these words:—"And if it should so happen that my son John Coltsman die without heirs of his body, lawfully begotten or to be begotten, in that case, and in default of such heirs, I do hereby devise and direct that my lands, castles, tenements, and premises at and about Flesk Castle, and mentioned in my said will, together with the plate, furniture, and library, in said will specified, also my lands, farms, tenements, and premises situate, lying and being at Dicksgrove, near Castleisland—all subject to and charged with the payment of the aforesaid annuity to my dear wife of £800 a-year, and also with the payment of any reasonable provision made with my consent by my said son for his wife, to be paid and payable to her during her natural life,—shall, at my son's death, descend to my grandson Daniel Cronin, his heirs, executors and

(a) 8 East, 141.

(b) 1 Exch. 526.

(c) 3 Ell. & Black, 219.

M. T. 1864. "assigns, for ever; the heir for the time being to add the name Exchequer. " 'Coltsman' to the name 'Cronin.' "

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I shall first consider this disposition in connection with the devise in fee of the lands of Flesk Castle, contained in the will.

If the word "issue" had been used instead of "heirs of the body," where these words occur in the codicil, the effect of the entire disposition would have been a devise of those lands to John Coltsman in fee, with an executory devise over to the testator's grandson, in the event of John Coltsman dying without leaving issue living at his death. The terms, "if it shall so happen that my son John Coltsman die without heirs of his body lawfully begotten, or to be begotten, in that case, and in default of such heirs," are coupled with the words, "shall, at my son's death, descend and be transferred to my grandson:" and thus, by the codicil, the death of John Coltsman, and the non-existence of heirs of his body at his death, constitute the event on which the lands are to go over to the next devisee. In this view, if the word "issue" had been employed instead of the words "heirs of his body," and "such issue" had been used instead of "such heirs," the case must have been governed by the rule of construction applied in the decided cases referred to in 2 *Jarman on Wills*, c. 41, p. 472, *et seq.*, including *Doe v. Frost* (a), *Ex parte Davies* (b), and *Parker v. Birks* (c); a rule of construction recognised by Lord St. Leonards, in *Jones v. Ryan* (d)—that is, there would have been (after the devise in fee to John Coltsman, contained in the will) an executory devise, by the codicil, to Daniel Cronin, to take effect upon the death of John Coltsman dying without leaving issue living at his death. It is however contended, on the part of the plaintiff, that whether the devise of Flesk Castle in the will was a devise in fee, or (what the plaintiff's Counsel contended it was) a devise for life only, the words "die without heirs of his body," and "in default of such heirs," must be construed by implication, reducing the previous devise from a devise in fee (or enlarging it from a devise for life) to a devise in tail. And the plaintiff's Counsel

(a) 3 B. & Ald. 546.

(b) 2 Sim., N. S., 114.

(c) 1 Kay & John. 156.

(d) 9 Ir. Eq. Rep. 249.

then contend that the devise over, since it *can* be treated as a contingent devise in remainder expectant upon the contingency of John Coltsman dying and leaving no heir of his body living at his death, *must* be so treated (according to the general rule applicable to remainders and executory devises), and can *not* be treated as an executory devise, since it *can* be treated as a contingent remainder; and he contends that, such being the effect of the whole disposition, the estate tail and the contingent remainder were barred by the disentailing deed. An exactly similar argument appears to have been dealt with in two of the cases to which I have last referred: *Ex parte Davies* (a) and *Parker v. Birks* (b). The plaintiff's Counsel distinguishes the present case from the class of decisions last referred to, by contending that the words "heirs of his body," used in this codicil, have a force and operation in creating, by implication, an estate tail in the first devise, which did not belong to the terms used in any of those cases: for instance, in *Doe v. Frost* (c) the words were, "If the said W. Frost (to whom a previous estate had been given in fee) should have *no children, child or issue*, the said estate is, on the decease of the said W. Frost, to become the property of the heir-at-law, subject to such legacies as the said W. Frost may leave by will to any of the younger branches of the family." In *Ex parte Davies* the devise was of a residue to the testator's "son Mathew, his heirs, executors, administrators and assigns," with a proviso, and he declared it to be his will, "that, in case his son Mathew should die *without leaving any lawful issue of his body*, such part of his residuary estate so given to him as might be in the nature of "freehold, situated," &c., "should, *at his death*, be divided into "two equal parts;" and the testator devised one-half to another son, and the other to a daughter, in fee; "his son Mathew having it "in his power to give support to the children of his late sister Anne "(if he thought proper, but not otherwise)," out of certain personal

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(a) 2 Sim., N. S., 114.

(b) 1 K. & J. 156.

(c) 3 B. & Ald. 546.

M. T. 1864. *Exchequer.* estates. In *Parker v. Birks* (a), the devise was to the testator's
 COLTSMAN "brother Henry Wilkinson, his heirs and assigns, for ever, two-
 v. "thirds of his real estate; and to his nephew William Shaw, the
 COLTSMAN. "remaining one-third of his real estate, and to his heirs and
 "assigns, for ever; but in case his nephew William Shaw should
 "die *without child or children of his body lawfully begotten*, he
 "ordered, and it was his will, and he gave and devised to the
 "children of his niece Hannah Grey, their heirs and assigns,
 "for ever, on the decease of the aforesaid William Shaw, that
 "part of his said real estate devised to his nephew William
 "Shaw." As I have already mentioned, the Court, in each of
 these cases, held that there was a devise in fee to the first devisee,
 with an executory devise over, to take effect on the failure of issue,
 at his death, of the first devisee. In *Doe v. Frost* and *Parker v.*
Birks, "child and children" were treated as signifying "issue."

It is, I believe, quite true, as was stated in the course of the arguments, that no case is to be found in which a devise over, after a devise in fee or for life, has been framed in terms exactly similar, in the use of the words "*heirs of his body*" and "*in default of such heirs*," to those contained in this codicil. It is, I apprehend, equally true, upon principle and authority, that if the devise had been expressly "to John Coltsman and the heirs of his body," followed by a devise over, in the very terms of this codicil, John Coltsman the younger would have taken an estate tail, with, not an executory devise, but a remainder, to Daniel Cronin; and, as I apprehend, that remainder would have been contingent upon John Coltsman dying without leaving an heir of his body living at his death: in other words, contingent upon his estate tail terminating at his own death. The devise then would have been in this form—
 "To John Coltsman *and the heirs of his body*; and if it should so
 "happen that my son John Coltsman die without heirs of his body
 "lawfully begotten or to be begotten, in that case, and in default of
 "such heirs, I do hereby devise and direct that my lands" of Fleak
 Castle and Dicksgrove "shall, at my son's death, descend and be
 "transferred to my grandson Daniel Cronin, his heirs, executors and

(a) 1 K. & J. 156.

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"assigns, for ever." Such a devise would be in effect nearly identical with that in *Doe v. Rucastle* (a), with this difference, that in *Doe v. Rucastle* the first devise was for the life of the devisee. There, the devise was of certain lands to the testator's son Stephen, "for and during his natural life; and from and after his death, then "I give and devise the same to *the issue of his body* lawfully begotten, if more than one, equally amongst them; and in case he shall "not leave any *issue of his body*, lawfully begotten, *at the time of his death*, then I give and devise the same to my heir or heirs-at-law." The Court held that the words "issue of his body" meant "heirs of his body;" that the words of distinction were immaterial (of course, following the doctrine laid down in *Jesson v. Wright* (b), and that, under the devise, the testator's son Stephen took an estate tail. In *Doe v. Goldsmith* (c), the testator devised to F. Goldsmith his son "all his lands and tenements," &c., "to hold to him and his assigns, for his natural life; and, immediately after his decease, he devised the same premises unto the heirs of his body lawfully to be begotten, in such parts, shares and proportions, manner and form, as Francis his son should by 'will or deed' demise or appoint; and *in default of such heirs of his body* lawfully to be begotten, *then, immediately after his decease*," the testator devised the premises to his son John Goldsmith, in fee." It was held that Francis Goldsmith, the first devisee, took an estate tail; and, accordingly, that the devise over was barred by a recovery suffered by him. The decision in *Wright v. Pearson* (d) has been considered as also establishing that the circumstance of the devise over being made, in express terms, to depend on the prior devisee *leaving no issue living at the time of his death*, would not prevent the prior devisee from taking an estate tail: 2 *Jarman on Wills*, p. 336. I apprehend however that *Wright v. Pearson* cannot be relied on as so determining; because the Lord Keeper, in his judgment (1st ed., p. 126), treats the words referring to the time of the death as connected, not with the devise over, but with a clause providing certain charges for the testator's nieces.

(a) 8 Com. Bench, 876.

(b) 2 Bligh, 1.

(c) 7 Taunt. 288.

(d) 1 Eden. 119; S. C., 2 Ambl. 249.

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Upon the assumption that the argument of the plaintiff's Counsel can be so far sustained, the question remains whether, by the words used in this will and codicil, which contain no express devise of an estate tail, an estate tail by implication is created by the use of the words "die without heirs of his body lawfully begotten or to be begotten," and "in default of such heirs," coupled with the gift over "at my son's death." An argument, in favor of the construction which would treat the devise as giving an estate tail by implication, has been drawn from the absence of any provision in the Wills Act (1 Vic., c. 26), in reference to such words as "heirs of the body," similar to the provisions which enact (section 29) that words which may import a want or failure of "issue" of a person in his lifetime, or at his death, or an indefinite failure of "issue," shall be construed to import a want or failure of issue in the lifetime or at the death. It is contended by the plaintiff's Counsel (and an observation to somewhat the same effect is made by the learned editor of *Jarman on Wills*, vol. 2, p. 507), that the statute does not deal with the terms "heirs of the body," because these words have a distinct meaning, in which the legal sense and the popular sense are the same. But this argument cannot determine the controversy here; for still the question remains, whether, in the context of this codicil, the testator used these words in the sense of creating an estate tail, by showing an intention that the issue of John Coltsman should inherit as the heirs of his body—in which case they must derive through him,—or whether he used them, coupled with the gift over at John Coltsman's death, only in the sense of describing the contingency of there being at his death no issue of John Coltsman in existence; and thus defining *that* event as *the contingency* on which the lands should go over to the next devisee, without altering the character of the estate previously given to John Coltsman.

As to that question; the inherent force of the words "heirs of the body" and "in default of such heirs;" their effect, generally, upon a preceding devise, whether a devise in fee or a devise for life; the absence of any direct authority for giving them a restricted meaning where they are used in such a context as is presented by this codicil; the circumstance, that as to Dicksgrove, an implied estate tail would

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tend to effectuate, by way of remainder, and an executory devise would wholly frustrate, the apparent intention of the testator in the event of John Coltsman having died leaving issue—in which case there would have been a partial intestacy. All these considerations have made me hesitate much before I came to the conclusion, as to the construction of this codicil, at which I have arrived. But, as to the lands of Flesk Castle, there are indications of intention, apparent, as it seems to me, upon the will and codicil, which determine me in holding that the combined effect of the two instruments is, that there was a devise in fee to John Coltsman, with an executory devise to the testator's grandson, if John Coltsman should die having no issue living at his death, in conformity with the construction given to the term "issue" in the class of cases to which I before referred, including *Doe v. Frost*, *Ex parte Davies*, and *Parker v. Birks*. I think the codicil shows a plain intention of the testator, that Flesk Castle should not pass out of the testator's family. It could only pass out of his family by alienation. By the devise in the will, of the whole interest to John Coltsman, full dominion would have been conferred on him of alienating those lands to a stranger. By the codicil the testator plainly intended to correct that result of his will. He shows a clear intention that his grandson should have the lands in absolute dominion, if no issue of John Coltsman should exist at John Coltsman's death. He gives strong collateral indications of his desire to retain those lands in the family. Flesk Castle appears to have been the place of the family residence of the testator; for, in connection with these lands, he gives by his will the absolute property in his plate, library, pictures, and furniture. In the codicil, he alters the bequests as to these; and instead of giving them absolutely to John Coltsman, he professes to give them in express terms to his grandson, *with the lands of Flesk Castle*, at the death of John Coltsman dying without "heirs of his body." He requires that his grandson Daniel Cronin, shall "add the name of Coltsman to that of Cronin." All these provisions of the codicil show a plain and deliberate intention of the testator of reversing what he had done by his will, and, after incorporating it into his codicil, to secure in the person of his grandson Daniel

M. T. 1864. Cronin, if he could not secure in the issue of John Coltsman, a representative of his own name and family as the owner of Fleak Castle. I feel myself then authorised to give, to the term "heirs of the body," coupled with the reference to the death of John Coltsman, that construction which shall best effectuate the intention of the testator, by preventing the exercise of the power of alienation which he had conferred by the will. And I think this can be most effectually done by giving to the terms which he has used in the codicil, not the force of creating an estate tail in John Coltsman, but the force of an executory devise over in the event which the codicil has defined. There can be no doubt that the words "heirs of the body" are less flexible (to use a term employed on this subject for want of a better) than the term "issue:" see *Lees v. Measely* (a); *Ex parte Wynch* (b); *Roddy v. Fitzgerald* (c). But there can be no doubt also that the intent of the testator, plainly expressed, or indicated by a context of which the sense is clear, may control the ordinary import of "heirs of the body," and give to these words the same import which the Courts gave to the term "issue" in the class of cases to which I have last referred.

I have now to deal with the devise of the lands of Dicksgrove. And here that difficulty is at once presented, which operated so plainly on Lord Hardwicke's mind in *Wylde v. Jervis* (d), namely, that by construing the devise over as an executory devise after a previous life estate in John Coltsman the testator's son, John Coltsman's issue, if he had left any when he died, could have taken nothing in these lands *under the will and codicil*. If (as no doubt would have been the fact) such issue would have been the heir or heirs-at-law of John Coltsman the testator, they would have taken as such—but only as such,—and upon an intestacy as to Dicksgrove; which is not, if possible, to be treated as in the contemplation of the testator. Dicksgrove would not have gone over to Daniel Cronin, because there would have been issue of John Coltsman at John Coltsman's death; and it would not have

(a) 1 Younge & Cal. 599.

(b) 5 De G., M'N. & G. 599.

(c) 6 H. of L. Cas. 881.

(d) 1 Atk. 482; West's Cases, *temp.* Hardwicke, 311.

devolved upon the issue *under the will and codicil*, because under these they could only take through John Coltsman as heirs of the body of a devisee in tail; and upon the defendant's construction of those instruments, John Coltsman took, not an estate tail under the codicil, but an estate for life under the will. That such a construction ought to be avoided, if the words of the testamentary disposition warrant the Court in avoiding it, appears to be the opinion of Vice-Chancellor Wood (adopting the proposition, at section 104, of *Prior on Issue*), as expressed in *Blinston v. Warburton* (a); and it appears to have been also, as I have said, the opinion of Lord Hardwicke in *Wylde v. Lewis* (b). See also 1 *Jarman on Wills*, p. 519; vol. 2, pp. 474, 494. And if the devise over of Dicksgrove had been contained in a separate clause of the codicil, I should have had great difficulty in acting upon any other view of the testator's intention than by holding that he intended John Coltsman's issue to have the lands of Dicksgrove; and since they could only take them, under the will, by treating "heirs of the body" as words of limitation, and so treating the estate of John Coltsman as an estate tail, to hold that such estate was, by implication, given to him by the words of the codicil.

I feel however constrained to give to the devise over of Dicksgrove and to that of Flesk Castle the same interpretation. The disposition of both is made in one and the same clause. I cannot interpret the same words as having two different, and, in effect, opposite meanings in the same sentence. This would be going a great deal farther than was done in *Forth v. Chapman* (c), and would be construing the same words, applied in common to two denominations of real estate, with precisely the same context, in two different senses. I am aware that in thus giving, to the devise over as to Dicksgrove, the construction of an executory devise, because I give a similar construction to the same disposing words as to Flesk Castle, my reasoning is exposed to the retort of this argument—that instead of first giving a construction to the devise over of Flesk Castle, and thus binding myself to give

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(a) 2 K. & J. 405.

(b) 1 Atk. 432; S. C., West, 311.

(c) 1 P. W. 663.

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COLTSMAN. a similar construction to the same words as to Dicks Grove, I ought first to construe the devise of Dicks Grove as a devise to John Coltsman in tail, with a contingent remainder to Daniel Cronin, and thus enable myself to give a similar construction to the same words as to Fleck Castle; and this argument, by way of retort, may be fortified by urging, that while to construe the devise over of Dicks Grove as an executory devise, instead of a remainder expectant on an implied estate tail, must in one event involve an intestacy,—to construe the devise over of Fleck Castle as a contingent remainder expectant in an implied estate tail, would involve no such result, and would, moreover, provide in some way for every object of the testator's bounty, for whom a bounty was intended by the will. To this I can only answer, that having regard to the entire disposition made by the will and the codicil, I think the testator's intention will be more fully carried out by the construction which I give to them. If an estate tail be implied to have been given to John Coltsman, it is undeniable that he will have been invested with the power of doing two things, which appear to have been the very opposite of what the testator intended; first, to bar the devise to Daniel Cronin, in the event (which happened) of John Coltsman dying without leaving issue living at his death; secondly, to vest the whole estate and interest in both Fleck Castle and Dicks Grove in John Coltsman's widow, as to whom the testator had declared his intention to be that the lands should be charged "with the payment of any reasonable provision made, with my consent, by my son for his wife, to be paid and payable to her during her natural life." Again, it was plainly the intention of the testator that the "plate, furniture, and library" at Fleck Castle should go with the lands to his grandson, in the same event in which the lands should go over to him. If a different construction from that which I am giving to this codicil (and from that which was given to the will in *Wilkinson v. South*) (a), be given to the devise over of Fleck Castle, the "plate, furniture, and library," instead of going over with the lands to the testator's grandson, would have become the absolute property of John Coltsman. If he became tenant in tail

(a) 7 T. R. 555.

of the lands, he must have become absolute owner of the personalty, disposed of by the same clause and words of the codicil as those which disposed of the lands.

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I should observe that the construction, confining to the death of John Coltsman the contemplated failure of the heirs of the body, is materially aided by the clause which charges on all the lands "any reasonable provision made, with the testator's consent, by the testator's son John Coltsman, for his wife, to be paid to her during her life." This provision of the codicil shows that the testator looked to the death of John Coltsman as the period at which ulterior rights were to be determined; and although a provision of this nature, not making the sum charged payable by the devisee, would not give to the previous devise the effect of a devise of the fee, it has been, in several cases, applied in giving to the devise over a restricted construction, by confining the dying without issue to a dying without issue living at the death of the first devisee: *Doe v. Frost* (a); *Ex parte Davies* (b); *Doe v. Webber* (c).

Upon the whole, we are of opinion that the two denominations of land, Flesk Castle and Dicksgrove, became, upon the death of John Coltsman, without leaving issue living at his death, the absolute property of Daniel Cronin, taking the name of Coltsman, as directed by the codicil; and consequently that the direction of my Lord Chief Justice of the Common Pleas was right; and that the cause shown against the conditional order, to set that verdict aside and enter a verdict for the plaintiff, ought to be allowed.

HUGHES, B., concurred.

Cause shown allowed.

(a) 3 B. & Ald. 546.

(b) 2 Sim. N. S. 114.

(c) 1 B. & Ald. 713.

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BERNAL v. CROKER.

(*Common Pleas.*)

Nov. 5, 18,
 23.

To an action by indorsee against acceptor of a bill of exchange, for £97. 4s. 9d., payable three months after date, the defendant pleaded that said bill was passed to secure, amongst other things, a sum of £39. 8s. 3d., due by T. C., before he was discharged as an insolvent, to plaintiff, which debt afterwards duly appeared on the insolvent's schedule, together with interest, up to passing said bill to plaintiff; that T. C. was afterwards duly discharged from said sum by virtue of the proceedings in the said insolvency, of which the plaintiff, at the time of drawing, &c., said bill, had notice; and also to secure £30, advanced by plaintiff to defendant, at the time of the acceptance and indorsing of said bill; that, save said £30, there was no consideration for the acceptance, &c., of said bill; that, since said bill became due, defendant had paid £5, parcel thereof, to plaintiff. Averment of payment into Court of £30.—*Held*, on demurrer, that the suspension of the plaintiff's remedy to proceed against the after-acquired property of his debtor, in the Insolvent Court, was a sufficient consideration for the indorsement of the bill, to make him a holder for value; and that his right to recover against the acceptor was not affected by the 230th section of the Irish Bankrupt and Insolvent Act 1857, notwithstanding that the bill had been in part passed to secure the scheduled debt of the drawer.

THIS was an action to recover the amount of a bill of exchange, drawn by Thomas Croker, on the 12th November 1860, upon the defendant Richard Croker, for £97. 4s. 9d., payable to his order at the Bank of Ireland, George's-street, Limerick, three months after date, and accepted by defendant, and indorsed to plaintiff.

Defence, as amended during argument, that the said bill of exchange was passed to secure, amongst other things, a sum of £39. 8s. 3d., due by the Rev. Thomas Croker, before he was duly discharged as an insolvent, to the plaintiff, which debt duly appeared on the said insolvent's schedule, together with interest on such debt from the year 1855 up to the date of the passing of the said bill to the plaintiff, and from which debt the said Croker was duly discharged by virtue of the proceedings in the said insolvency; of all which the plaintiff, at the time of drawing and accepting the said bill, had due notice; and also to secure the sum of £30, advanced, *at the time of the acceptance of the said bill by the defendant, and the indorsement of same to plaintiff*, by the plaintiff to the defendant;

Held (Per MONAHAN, C. J.), that this result equally followed, whether the bill in question was to be regarded as having been accepted for the accommodation of the drawer or not.

Held (Per CHRISTIAN, J.), that the defence sufficiently showed that the indorsing of the bill was part of the original transaction, and that the bill had not been accepted for the accommodation of the drawer.

[that, save to the extent of the said sum of £30, there was no consideration for the acceptance of the defendant of said bill *and the indorsement of same to plaintiff*; and that, since same became due, defendant had paid to plaintiff £5 on foot of same, at the time and in the manner indorsed; and that there remained due on foot of said bill no greater sum than £30, which defendant brought into Court.

The plaintiff demurred, and noted the following points:—

First—That the defence does not show the plaintiff to be a holder without consideration of the bill of exchange in said defence mentioned.

Second—That the holder of a bill of exchange for good consideration is entitled to recover the whole amount of such bill, even from an accommodation acceptor.

Third—That a debt from which a debtor has been discharged under the Insolvent Act is sufficient to support the indorsement of a bill of exchange.

Fourth—That where a bill of exchange is indorsed by an insolvent, to secure a debt from which he has been discharged under the Insolvent Act, the legal remedies upon such bill of exchange are not suspended in favor of any party thereto, save and except such insolvent.

Fifth—That the plaintiff, being a holder for good consideration, the adequacy of such consideration is not a question into which the Court will enter.

Daniel and Heron, in support of the demurrer.

Jellett and Ryan, contra.

The following cases and authorities were cited:—*Best v. Barker* (a); *Rea v. McCabe* (b); *Perry v. Skinner* (c); *Flight v. Reed* (d); *Byles on Bills*, pp. 118, 226; *Evans v. Williams* (e); *Ashley v. Killick* (f); *Popplewell v. Wilson* (g); *Nelson v.*

(a) 8 Price, 533.

(c) 2 M. & W. 476.

(e) 1 Cr. & M. 30.

(b) *Hayes*, 484.

(d) 1 H. & C. 708.

(f) 5 M. & W. 509.

(g) 1 Str. 264.

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Cur. ad vult.

MONAHAN, C. J.

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Feb. 1.

This is an action by indorsee against acceptor of bill of exchange, dated 12th November 1860, for £97. 4s. 9d., drawn by Thomas Croker on the defendant Richard Francis Croker, accepted by him, and indorsed by Thomas Croker to the plaintiff. Defendant pleads that the bill was indorsed to the plaintiff to secure a debt of £39. 8s. 3d. and interest, then due by the drawer of the bill to the plaintiff, and from which he was discharged, in the year 1855, as an insolvent, under the provisions of the Insolvent Act then in force, 3 & 4 *Vic.*, c. 107; and also a sum of £30, advanced by the plaintiff to the defendant; and that there was no consideration for the drawing, accepting, or indorsing of the bill, save the said two sums of £30 and £39. 8s. 3d.; that a sum of £5 has been paid before action, and a sufficient sum lodged in Court to pay the residue due on foot of the £30 so advanced to the defendant.

To this defence the plaintiff has demurred; and the question is, whether the plaintiff can recover against the acceptor of a bill of exchange, passed for a debt from which the drawer was discharged under the 3 & 4 *Vic.*, c. 107?

It was perfectly settled that, under the original Insolvent Acts, the old debt was a sufficient consideration to maintain an action, on an express promise to pay it; and therefore there can be no doubt that if, prior to 3 & 4 *Vic.*, c. 107, a discharged insolvent indorsed or accepted a bill of exchange for the old debt, he would have been liable on such a bill; and, of course, so would the acceptor of a bill of exchange, accepted for the accommodation of the drawer, the

(a) 4 M. & W. 795.

(c) 1 Esp. 261.

(e) 4 Taunt. 602.

(b) 16 L. Times, 8.

(d) 11 A. & E. 438.

(f) 3 Esp. 47.

(g) 5 El. & Bl. 238.

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discharged insolvent. Most of the old cases on this subject are collected in the *note* to *Wennall v. Adney* (a), referred to with approbation by Lord Denman, in the case of *Eastwood v. Kenyon* (b). The precise point was decided in *Rea v. McCabe* (c), on demurrer, that a bill of exchange, accepted for a debt for which the acceptor was discharged as an insolvent, could be recovered against him. This case has therefore been argued on the 82nd section of the Insolvent Act in question, 3 & 4 Vic., c. 107, by which it is enacted that if any action shall be brought against a discharged insolvent, for any debt or sum of money, or on any new contract or security for payment thereof, it shall be lawful for such person to plead generally his discharge under said Act. It is quite plain that this Act, at all events in terms, only applies to an action brought against the insolvent himself or his representative, and not to an action brought against third persons. But it has been argued that this statute has received a liberal construction; and that a bill like the present, which may be in some degree considered as a bill accepted for the accommodation of the discharged insolvent, cannot be rendered available against the acceptor; as, if it could, the acceptor would have a right to sue the drawer, as having paid a bill accepted for his accommodation. It is quite true that this statute, or rather the corresponding one in England, has received a very liberal construction; for instance, in the case of *Evans v. Williams* (d), in which case the defendant was one of the makers of a promissory note, for which another was surety for him. The defendant was discharged as an insolvent. The plaintiff, who was the payee and holder of the note for which the defendant was so discharged, threatened to sue the surety; and, to induce the plaintiff to give him time, the defendant and the surety gave to the plaintiff the note on which the plaintiff now sued the defendant, who contended that he was not liable, it being a new security for the old debt, from which he had been discharged; and so the Court of Exchequer held, notwithstanding that it was very strongly insisted by the plaintiff that the real consideration for the note in question was the time given to the

(a) 3 B. & P. 249.

(b) 11 Ad. & Ell. 447.

(c) *Hayes*, 484.

(d) 1 C. & M. 30.

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other maker, the surety ; which no doubt would have been ample consideration to a stranger for joining in the note. Still the Court held that it was a new security for the old debt ; and therefore that the discharged insolvent could not be held liable on it. It is therefore quite clear that, notwithstanding the new consideration for the £30, advanced by the plaintiff to the defendant, the acceptor of the bill, the plaintiff could not maintain an action on it against the drawer, the discharged insolvent. But, though no action could be maintained by the plaintiff against the drawer of this bill, yet it was quite clear that if the drawer were to pay the amount of it to the plaintiff, or if, without passing any new security, he paid to the plaintiff the amount of the debt from which he was discharged, he could not recover from the plaintiff the amount so paid. That is the point expressly decided in *Verner v. Hawkins* (a). If an insolvent cannot recover from his creditor money paid on account of the old debt, it would seem to follow that neither can he recover any other valuable thing given in satisfaction or discharge of such debt. If so, if the discharged insolvent were the holder for value of the acceptance of a third person—as, if the bill were accepted for value, by the defendant, received from the drawer of the bill, and that the drawer were to indorse the bill to the plaintiff, in satisfaction of the old debt—it would seem to follow that the drawer could not in detinue or trover recover from the plaintiff the bill in question ; nor do I see how the defendant could in such a case successfully resist the payment of the bill at the plaintiff's suit ; as, of course, even the indorsee without value of a bill accepted for value can recover the amount of the bill against the acceptor. But then it has been argued that this bill, to the extent of the old debt, is to be considered as a bill accepted by the defendant for the accommodation of the drawer, the insolvent ; and that, as the indorsee of an accommodation acceptance can recover against the acceptor only to the amount of the value given by him for the indorsement, that the old debt in the present case is not to be considered as any valuable consideration for the indorsement of

(a) 9 Exch. 266.

the bill of exchange, and therefore that the plaintiff is not entitled to recover the old debt in this action. No doubt the law is, as has been stated, that an indorsee without value, or for only partial value, can recover against the acceptor only the amount of consideration given by the indorsee to the drawer; yet I am not quite clear that this is to be taken as a bill accepted by the defendant for the accommodation of the drawer. It is perhaps nearer the truth that the bill was drawn as much, if not more, for the accommodation of the acceptor as of the drawer; but I shall consider the case as if this were a bill accepted by the defendant for the accommodation of the drawer, and by him indorsed to the plaintiff, in consideration and discharge of the old debt from which he had been discharged under the Insolvent Act. The question is, is this to be considered as an indorsement for value, or one without consideration? It is quite clear that if a third person will pass a promissory note, or accept a bill of exchange, payable at a future day, for a debt due by another, this is a true and good consideration; the consideration being an understanding or agreement that the person for whose debt the bill was passed could not be sued for it while the bill was current; but, on the other hand, a bill payable immediately for the debt of a third person would not be considered as a bill for value; and defendant argues that the indorsement to the plaintiff must, under the circumstances, be considered as an indorsement without value; and he relies on the case of *Nelson v. Serle* (a), in the Court of Error, reversing the decision of the Court of Exchequer, reported in the first page of the same book. In that case, a party having died indebted to the plaintiff, the widow of the deceased debtor gave a promissory note for the amount of the debt so due by her husband. To an action brought against her for the amount, she pleaded that there was no consideration for the note, except the debt so due by her deceased husband, and that there was no personal representative of her deceased husband in existence, and that she had not been executrix *de son tort*. The Court of Exchequer held she was liable; but the Court

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of Error held differently, there being no one in existence liable to be sued for her husband's debt. The defendant's Counsel here say there was no one liable to be sued for the debt for which the insolvent was discharged. I do not accede to this argument. The old debt was still in existence, though no ordinary action could have been brought against the discharged insolvent on foot of it; but other proceedings could have been taken against him in relation thereto. On his discharge, he must have executed a warrant of attorney for the amount of all his debts; under which, at the instance of the plaintiff, or any other of his creditors, the Insolvent Court could permit execution to be taken out against his subsequently acquired property. The suspension of this remedy we consider a valuable consideration to support the indorsement of the bill to the plaintiff, although it is to be treated as an accommodation acceptance by the defendant. But, though it has been said that, by holding the plaintiff entitled to recover against the defendant the amount of this bill, it will follow that the defendant will be entitled to recover against the drawer, for whose accommodation he accepted it, to the extent of the old debt, it is not necessary for us to decide whether this result will follow; but, so far as I individually am informed, I am not aware of anything to prevent a discharged insolvent from requesting a third person to accept a bill of exchange for his accommodation; and if the acceptor is obliged to pay the amount, no doubt, in ordinary cases, the acceptor will be entitled to sue the drawer for not having indemnified him from the payment thereof. I confess I do not see why the accommodation acceptor should be deprived of this right, in consequence of the insolvent, either with or without his assent, having indorsed the bill to a creditor from whose debt he was discharged; but, be this as it may, after giving the matter the best consideration in my power, I am of opinion that the plaintiff is a holder for value of the bill in question, and therefore entitled to recover the amount from the defendant, the acceptor. I do not mean to say that the case is altogether free from difficulty; and therefore we shall have both the summons and plaint and defence amended in the manner required by both plaintiff and defendant,

in order that the defendant, if dissatisfied with the judgment of this Court, may have an opportunity of having it reviewed by a Court of Error, and not be turned round by any formal defect in the pleadings.

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We shall therefore allow the demurrer to the defence.

BALL, J., concurred.

CHRISTIAN, J.

I concur in the rule pronounced by the CHIEF JUSTICE; but I desire to state briefly the view I have taken of the case.

The question which was argued at the Bar (and which the pleadings, though not as precise as might be wished, did in my opinion substantially and sufficiently raise) was as follows:—The defendant asserted that, save for two sums of £30 and £39 (which were circumstanced as averred in the defence, and stated by the CHIEF JUSTICE, and which I need not repeat), there was no consideration whatever for his acceptance. As to the £30, he admitted his liability, and paid it into Court. As to the £39, he insisted that, on the facts stated in the plea, it was not a legal consideration. Whether it was so or not was the question argued before us, and now to be decided.

I am further of opinion that the plea, although in this respect also somewhat loose in its averments, does contain sufficient to show what I consider to be material, that the plaintiff did not occupy, as regards this bill, the position of an ordinary indorsee—that is to say, of one not in privity with the drawing and accepting of the bill. On the contrary, it does appear that the drawing, accepting, and indorsing, were all one transaction, and that the sum of £30 cash, which the defendant insists was the only consideration for his acceptance, was paid by the plaintiff, not to T. Croker, the drawer and indorsee, but directly to the defendant the acceptor himself. It was an original transaction between the plaintiff and the defendant directly, in which, so far as we can discover, Thomas Croker was no otherwise concerned than that one of the sums intended to be secured had been a debt of his before his insolvency. This

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view of the relations of the parties disposes of a considerable portion of the argument which was addressed to us. Cases were cited, and principles referred to, regulating the liabilities of accommodation acceptors. But, in my view, the defendant was not an accommodation acceptor at all. An acceptance cannot be for accommodation, unless the drawer be not only liable, but primarily liable, upon the bill, so that if, through his default, the acceptor be made to pay, the latter will have a remedy over against the former. But, in the present case, by the 230th section of the Bankrupt and Insolvent Act (20 & 21 *Vic.*, c. 60), or the 82nd section of the Irish Insolvent Act (3 & 4 *Vic.*, c. 107), if that was the Act under which the discharge took place, Thomas Croker the drawer was, as to the only part of the consideration for the bill with which he had any previous concern (so far at least as we can know from this record), absolutely discharged from liability, not only upon the old debt, but upon the bill also. The plaintiff, as indorsee with notice, was from the beginning without remedy against him on the bill, as to the £39. 8s. 3d.; and consequently the defendant's acceptance could not, as to that, be an accommodation for him; and as to the £30, which was paid to the defendant himself, of course it was the drawer who accommodated *him* with his name, and not he the drawer. In short, for the purposes of the present argument, I consider the case precisely as it would have been if, instead of a bill with Thomas Croker as drawer and the defendant as acceptor, there had been a promissory note, with the defendant as maker and the plaintiff as payee, but intended to comprise, amongst the other considerations, this old debt of Thomas Croker's for £39. 8s. 3d.

Viewing the case, then, in that light, the simple question is, whether Thomas Croker's debt was a sufficient consideration for Richard Croker's acceptance? *Prima facie*, as we all know, the debt of one man will not *per se* support a promise by another to pay it. There must be some new consideration. But forbearance to sue on the original debt is a new and sufficient consideration; and, consequently, a bill or note by a stranger, payable at a future day, is valid, because there is implied a contract by the creditor not to sue on the original debt during the time of credit allowed. The

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bill in the present case is at three months from date; and therefore, supposing the Insolvent Act were out of the question, there could, I apprehend, be no doubt but that the implied forbearance to sue Thomas Croker on the original debt, as well as on the bill, for those three months, would be ample consideration to sustain Richard Croker's acceptance. But a promise to forbear suit is worthless if there be no right of suit; and the sections of the Insolvent Act, I have already referred to protected Thomas Croker from all suit, either upon the original debt or upon this bill. Therefore the plaintiff, by taking a bill at three months, gave up no right as against Thomas Croker personally; and thus, so far, no new consideration whatever was given by the plaintiff for Richard Croker's promise to pay a stranger's debt. If this were all, the defendant's argument would seem to be complete. The cases of *Best v. Barker* (a) and *Rea v. McCabe* (b), which were cited for the plaintiff, were decided before the clause which protects insolvents from liability on new securities or promises for the old debts formed part of the insolvent code, and are not authorities for the proposition that a promise to forbear for a limited time to sue a person against whom no right of suit exists at all, can be a consideration for a new promise by a stranger.

But nevertheless I am of opinion that there was in this case consideration sufficient to support this bill as to the £39. 8s. 3d., as well as the £30. The ground on which I think so is one which I more than once threw out in the course of the argument, but which was not as much discussed at the Bar, on either side, as it might have been. The Bankrupt and Insolvent Act gives certain equivalents for the rights which its 230th section takes away. By the 225th, 226th, 227th and 228th sections (corresponding to the 78th and 79th sections of the old Act), the creditors are empowered to make available, in the Bankruptcy and Insolvency Court, in the manner there pointed out, after-acquired property, of which the insolvent may be, or may have died, possessed. By taking the bill at three months, the plaintiff precluded himself from pursuing those remedies

(a) 8 Price, 533.

(b) Hayes, 484.

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during that period; and I do not see why *that* forbearance should not be as good a consideration as forbearance to sue the person would be but for the 230th section. It is not a sufficient answer to this, to say that it does not appear that Thomas Croker had any property which could be reached under those clauses. Neither does it appear that he had not; and it must be remembered that we have to do here with a promise in a shape which, *prima facie*, imports consideration. Besides, I think the relinquishment of the benefit of the contingency of there being ample property within the three months, would be a good consideration. The case of *Nelson v. Serle* (a) does not conflict with this. There it was held that a promissory note at twelve months, given by a widow, to secure a debt of her late husband, was void for want of consideration; because, as neither she nor anyone else had taken out administration, there was no one who could be sued—consequently, no one who could be forborne. But here the original debtor was living, and, though personally discharged, could be impleaded at any time in the Bankruptcy and Insolvency Court, under the 225th and following sections. If, in *Nelson v. Serle*, the widow had been executrix or administratrix, I apprehend the note would have been valid, even though she had no assets when she made it; as it would preclude the creditor from suing for judgment of assets *quando acciderint*. And so here, the plaintiff was precluded for three months from suing in the Insolvent Court against assets *quando acciderint*, or rather *si acciderint*. If Thomas Croker had, the day after the bill was drawn, become possessed of property worth thousands, the plaintiff could not proceed against it in the Bankruptcy and Insolvent Court till the three months were out.

It was argued by the defendant's Counsel that, if the plaintiff were allowed to recover in this action, the policy of the Insolvent Law would be violated; because it was said the defendant would have a remedy over against Thomas Croker, which would be contrary to the policy of the 230th section. But this is founded on the assumption that the defendant's acceptance was for the accommodation of Thomas Croker. I have already stated why I think

(a) 4 M. & W. 795.

this assumption entirely a mistaken one. Thomas Croker, having never been liable at all upon the bill, whether primarily or otherwise, the acceptor, when obliged to pay, could have no remedy over *upon the bill*, against him. If he would have any action at all, it would be on a new contract, subsequent to the insolvency, and therefore not obnoxious to the policy of the Insolvent Act.

The plaintiff being, in my opinion, upon the foregoing ground, entitled to judgment, it is unnecessary to say anything upon the other point presented by his Counsel—namely, that supposing the debt of £39. 8s. 3d. to be of no avail as a consideration, still, inasmuch as the Usury Laws are no longer in force, the £30 paid in cash was a sufficient consideration for the whole bill. Upon that I express no opinion.

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MURPHY v. MURPHY.

E. T. 1864.
April 29.
May 2, '6.

THIS was an action of ejectment on the title. The action was brought to recover the possession of part of the lands of Killenleigh, in the county of Cork. The case was tried before the

In ejectment by the survivor of two joint-tenants against the devisee of the other, it appeared that, about twenty-seven years before the bringing of the ejectment, the plaintiff and the defendant's testator, who were joint-tenants under a lease, made an equal partition of the demised premises by parol, and that the moiety allotted to the defendant's testator, and which was the subject of the ejectment, had been in the exclusive occupation of the defendant's testator, and afterwards of the defendant, from the date of the partition until the bringing of the ejectment.

Held, that the exclusive occupation of the defendant and his testator for such a length of time had barred the plaintiff's right, under the joint operation of the 2nd, 3rd and 12th sections of the Statute of Limitations (3 & 4 W. 4, c. 27).

The 12th section of the Statute of Limitations applies not only to the case where one of several joint-tenants has been in possession of "the entirety" of the whole of the lands held jointly, but also to the case where such tenant has been in possession of "the entirety" of any portion of such lands; and the words in that section, "or more than his or their undivided share or shares of such land," apply as well to the case where one of several joint-tenants has been in possession of more than his undivided share in any portion of the lands held jointly, as to the case where he has been in possession of more than his undivided share in the whole of such lands.

The case of *Tidball v. James* (29 L. J., N. S., Exch. 91), observed on and explained.

E. T. 1864. Right Hon. the **LORD CHIEF JUSTICE** of the Common Pleas, at the last Assizes for the county of Cork.

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At the trial, the plaintiff read in evidence a lease dated the 1st day of March 1819, whereby Lord Ennismore demised the lands of Killenleigh to the plaintiff James Murphy, and his brother Denis Murphy, to hold to them, their heirs, executors, administrators and assigns, for the life of the plaintiff, or twenty-one years. It appeared that Denis Murphy had died about eight years before the present ejectment was brought. The plaintiff claimed as surviving joint-tenant under the lease of 1819; and the defendant as devisee under the will of his father Denis Murphy.

The plaintiff stated, on cross-examination, that about twenty-seven years before the bringing of the present ejectment, he and his brother divided a farm (part of the demised premises) between them, and that since that division each of them occupied his own part in severalty, without any claim on the part of the other.

The present ejectment was brought for the part of the demised premises which had been so occupied in severalty by Denis Murphy and the defendant; the residue of the demised premises, which had not been divided, consisted of a small field, and was in the possession of an under-tenant.

The plaintiff further stated that no deed of partition of the lands had ever been executed; but that the division was entirely by a parol arrangement between himself and his brother; he also stated that, with respect to the field which had not been divided, each brother received from the under-tenant one-half of the rent payable in respect thereof; and that since the partition, each brother paid to the head-landlord one-half of the rent reserved under the lease of 1819. The plaintiff also read in evidence a deed of conveyance of the lands in question from the eldest son of Denis Murphy.

The defendant, who was a son of Denis Murphy by a second marriage, and who claimed as devisee under the will of his father, read in evidence probate of that will, and also gave evidence of the date of the parol partition.

At the close of the case, Counsel for the defendant contended that the plaintiff's right to recover was barred by the Statute of Limitations; and referred to the case of *Tidball v. James* (a): and also submitted, that from the twenty-seven years possession in severalty, the jury might presume that a deed of partition had been executed, notwithstanding the evidence of the plaintiff. The learned CHIEF JUSTICE accordingly left the question to the jury, whether a deed of partition had been executed; and they found that no such deed had in fact ever been executed. His Lordship then, by consent, directed a verdict for the defendant; and reserved leave to the plaintiff to move to have that verdict set aside, and a verdict entered for him, if the Court above should be of opinion that upon the whole case his Lordship should have directed a verdict for the plaintiff.

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On a previous day in this Term, *Chatterton* obtained a conditional order to set aside the verdict had for the defendant below, and to enter a verdict for the plaintiff, pursuant to leave reserved.

Joshua Clarke and *Jellett* now showed cause.

Chatterton and *Collins*, in support of the conditional order.

J. Clarke.

The plaintiff claims as surviving joint-tenant of the lease of 1819. The defendant is devisee of Denis Murphy, the other joint-tenant of that lease. Denis Murphy, and those claiming under him, have been in several possession of the lands the subject of the ejectment, for more than twenty years before the bringing of the action. It is submitted that such possession confers a good title on the defendant, under the joint operation of the 2nd, 3rd, and 12th sections of the Statute of Limitations (3 & 4 W. 4, c. 27).

The words of the 2nd section are:—"That after the 31st of December 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to

(a) 29 L. J., N. S., Exch., 91.

E. T. 1864. "some person through whom he claims; or if such right shall not
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 MURPHY "have accrued to any person through whom he claims, then within
 v. "twenty years next after the time at which the right to make such
 MURPHY. "entry or distress, or to bring such action, shall have first accrued to
 "the person making or bringing the same."

The 3rd section defines the time when the right shall be deemed to have first accrued. The 2nd section would not have applied to the case of joint-tenants, except where there was an actual *ouster*, if it had not been for the 12th section, on account of the Common Law rule, that a joint-tenant is seised *per my et per tout*. That rule has been done away with by the 12th section. It is therefore submitted that the moment the parties went into separate possession of their respective moieties, the right to make an entry or distress, or to bring an action, arose; and as more than twenty years have elapsed since that time, the defendant has acquired a good title under the statute. It may be here observed that *Blackstone*, in his *Commentaries*, has given an erroneous translation of the rule that joint-tenants are seised *per my et per tout*; in 2 *Black. Comm.*, p. 182, it is stated that "joint-tenants are said to be seised *per my et per tout*; by the half or moiety and by all." The word "*my*" in the rule does not mean "one-half" but "nothing;" and the meaning of the rule is, that joint-tenants are seised of nothing in severalty, and of the whole in jointure. The exact force of the words is given by *Lord Coke* (*Co. Lit.* 186 a), where, in commenting on the rule, he says, "*Et sic totum tenet et nihil tenet scilicet totum conjunctim et nihil per se separatim.*" This subject is discussed in the Reporter's note to *Murray v. Hall* (a).—[CHRISTIAN, J. The words of the 12th section of the Statute of Limitations are:—"When any "one or more of several persons entitled to any land or rent as "coparceners, joint-tenants or tenants in common, shall have been "in possession or receipt of *the entirety, or more than his or their "undivided share or shares* of such land, or of the profits thereof, "or of such rent." In the present instance the plaintiff was in separate possession of one-half of the land. Does the section apply to such a case as that?—The words "entirety, or more than his

(a) 7 C. B. 455.

or their undivided share or shares," refer not to the quantity of land, but to the amount of interest which the party may have in any portion of the land; for example, if one of two joint-tenants be in exclusive possession of one-tenth of the land for twenty-years, he would be in possession of the "entirety of such land," within the meaning of the 12th section, so as to acquire a title under the statute. The case of *Tidball v. James (a)* is a direct authority. The present case can be supported without the aid of the 12th section, as the exclusive possession for twenty-seven years amounted to an actual *ouster*.

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He cited *Keefe v. Kirby (b)*.

Chatterton and Collins.

By the Statute of Frauds (7 W. 3, c. 12) a joint-tenancy could not be severed except by an instrument in writing; and a deed was rendered necessary by the Real Property Amendment Act (8 & 9 Vic., c. 106). The jury have negatived the existence of a deed in the present case. The defendant must therefore rely on the Statute of Limitations; and he cannot avail himself of the 2nd section of that statute without the aid of the 12th. The words of the 12th section are:—"That when any one or more of several persons "entitled to any land or rent, as coparceners, joint-tenants, or "tenants in common, shall have been in possession or receipt of "the entirety, or more than his or their undivided share or shares "of such land, or of the profits thereof, or of such rent, for his or "their own benefit, or for the benefit of any person or persons "other than the person or persons entitled to the other share or "shares of the same land or rent, such possession or receipt shall "not be deemed to have been the possession or receipt of or by "such last-mentioned person or persons, or any of them." The words "such land or the profits thereof, or of such rent," refer to the land or rent previously mentioned as the land or rent held in jointure, coparcenery, or tenancy in common. The defendant puts a forced construction on the words "entirety, or more than his or their undivided share or shares;" according to

(a) 29 L. J., N. S., Exch., 91.
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(b) 6 Ir. Com. Law Rep. 591.
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H. T. 1864. his construction "entirety" would be equivalent in many cases
Common Pleas to a small portion, and "more than" would frequently mean "less
 MURPHY than." The only authority cited is the case of *Tidball v. James* (a);
 v. but that case is so badly reported that no reliance can be placed
 MURPHY. upon it. It does not appear from the report of that case how the
 question upon the Statute of Limitations arose, for the life estate
 of the widow of the testator's father continued until the year 1845,
 and the joint-tenancy did not arise until after her death; so that the
 separate possession of the joint-tenants fell much short of the twenty-
 years required by the statute: the rule also is stated to have been
 made absolute, whereas the effect of the judgment of the Court
 would have been to discharge it.

Jellett, in reply.

It is submitted that, on the true construction of the 12th section,
 when a parol division has been made between joint-tenants, the
 statute begins to run from the moment they go into separate pos-
 session of their respective portions, without reference to whether
 the division be equal or unequal. If the construction put on the
 section by the plaintiff be right, it would apply only to the case of an
 unequal division. Such a construction would give rise to many
 questions of difficulty; as, the question whether the division was
 equal or unequal would involve investigations which would render
 the application of the section a matter of difficulty and uncertainty.
 The construction contended for by the defendant would get rid of
 all questions of that kind.—[CHRISTIAN, J. You read the section
 as if the words "more than" were "other than."]—Yes. But the
 defendant is not obliged to rely on the 12th section at all; the
 twenty-seven years' exclusive possession by him and those under
 whom he claims amounts to an actual *ouster*: *Doe d. Fisher v.*
Prosser (b).—[CHRISTIAN, J. The question of *ouster* is a ques-
 tion for the jury, and you did not ask for a finding upon it.]—
 Again, when the parol division had been made, and the parties had
 gone into several occupation of their respective portions, each
 became tenant at will to the other, of the undivided share of that

(a) *Ubi supra*.

(b) Cowp. 217.

other in the portion occupied by him in severalty: *Doe d. Tomes v. Chamberlaine (a)*. By the 7th section, where such a tenancy exists, the right to bring the action or make the entry shall be deemed to have first accrued either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy. Twenty-one years are therefore sufficient in the case of a tenancy at will; and as more than that time has elapsed in the present case, it is submitted that the defendant has acquired a title under the statute. No doubt, the case of *Tidball v. James (b)* is badly reported; but sufficient appears from the judgment of Martin, B., to show that the question now before the Court was in that case the subject of decision.

He cited *Doe d. Gray v. Staunton (c)*.

MONAHAN, C. J.

This is an ejectment on the title, tried before me at the last Assizes for the county Cork, for recovery of a portion of the lands of Killenleigh, in that county, containing between thirty and forty acres. It appeared that, by a lease dated the 1st of March 1819, the farm of Killenleigh was demised to the plaintiff James Murphy, and his brother Denis, their heirs, executors, administrators and assigns, for a term of lives still in being, at a certain yearly rent. It further appeared that the two brothers jointly occupied the farm from the year 1819 to about the year 1836 or 1837, with the exception of a small part, containing about three or four acres, which then was, and has since continued in the possession of an under-tenant. About the year 1836 or 1837, on the occasion of, or shortly after, the marriage of one of the brothers, they made a parol partition of the farm between them, with the exception of the small part in the possession of the under-tenant; and, since the partition so made, each brother occupied in severalty his own portion of the farm so allotted to him, without any claim or disturbance on the part of the other, each paying half the head-rent, and each receiving half the rent payable by the occupying tenant for the three acres. About

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(a) 5 M. & W. 14.

(b) *Ubi supra*.

(c) 1 M. & W. 605.

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eight years ago Denis Murphy, one of the lessees, died, having previously made his will, by which he devised his portion of the lands to the defendant, his eldest son by a second marriage, he having had a son also by his first marriage; and, since the death of his father Denis, the defendant has been in possession of the portion of the farm which had been in the possession of his father up to his death; and the plaintiff James Murphy has been in the possession of his own divided portion of the lands from the time the partition was so made in 1836 or 1837. The present ejectment was brought in the early part of the present year, by the plaintiff James Murphy, for the recovery of the portion of the farm which had been so in the exclusive possession of his brother Denis, from the year 1836 or 1837 to his death, about eight years since, and which has since been in the possession of the defendant as his devisee. The small plot of three acres, in the possession of the under-tenant, is not included in the ejectment; and the only question at the trial was, whether the plaintiff, as surviving joint tenant, was entitled to recover Denis's divided portion of said lands. Mr. *Clarke*, for the defendant, relied on the Statute of Limitations, and referred to a case of *Tidball v. James (a)* as in point. He also suggested that the jury, from the long possession, might presume that there had been a regular partition deed between the plaintiff and his brother Denis. I left the question to the jury; who however found, according to the evidence of the plaintiff, that there had been no partition deed, or any writing on the subject, between the brothers; and therefore the question turned entirely on the Statute of Limitations, which I was of opinion applied to the case; and I accordingly directed a verdict for the defendant, to be turned into a verdict for the plaintiff if I should not have so directed. The question of course depends on the true construction of the 2nd, 3rd, and 12th sections of the Statute of Limitations, 3 & 4 W. 4, c. 27.

Under the 2nd section, the ejectment must be brought within twenty years next after the right to bring the action or make the entry accrued; and under the 3rd section the right shall be taken to have accrued when the plaintiff ceased to be in possession of the lands for which the ejectment was brought. The

(a) 29 L. J., N. S., Exch. 91.

ejectment is brought for the thirty or forty acres of land, which the late Denis Murphy was in exclusive possession of from the year 1836 or 1837 to his death; and therefore, *prima facie* the plaintiff ceased to be in possession thereof in 1836 or 1837, more than twenty years before the bringing of the present ejectment; but if the matter rested there, the question would have arisen, whether Denis and James Murphy having been joint tenants, the possession of one joint tenant was not in law the possession of both; and therefore whether, during the lifetime of Denis Murphy, his possession should not be considered as the joint possession of himself and the plaintiff; and if this was so, it would follow that plaintiff did not cease to be in possession till the death of his brother Denis, which occurred only seven or eight year since: but then comes the 12th section, which enacts that, where any one or more of several persons entitled to any land or rent, as coparceners, joint tenants, or tenants in common, shall have been in possession of a receipt of the rents of the entirety, or more than his or their undivided share or shares of such land, for his or their own benefit, or for the benefit of any person other than the person so entitled to the other's share of said land, such possession or receipt shall not be deemed to have been the possession or receipt of such last-mentioned person. The argument before us turned altogether, I may say, on the construction of this section; and it was strenuously argued by the plaintiff's Counsel that the late Denis Murphy having been in possession of only a divided moiety of the entire farm, he was not, within the terms of that section, in possession of the entirety, or more than his undivided share of such land. This argument we cannot adopt. We are of opinion that the section applies, not merely to the case in which the joint tenant or tenant in common is in possession of the entirety of the whole farm or estates held jointly or in common, but that it equally applies to the case in which the joint tenant or tenant in common is in the exclusive possession of the entirety of any portion of the lands so held jointly or in common. In this case, the ejectment is brought for thirty or forty acres of land; of these thirty or forty acres, the late Denis Murphy, and

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the defendant claiming under him, have, for the last twenty-seven or twenty-eight years, been in the possession of the entirety, within the terms of the 12th section; and that the fact of the other joint tenant having been in possession of the entirety of other portions of the entire thing, held jointly, does not in any way prevent the co-tenant having been in possession of the entirety of the land sought to be recovered in this ejectment. Denis Murphy was in possession of the entire, though his title was only to an undivided moiety; and that the words "or more than his undivided share" apply only to the case in which the party is in possession of an undivided share greater than what he is really entitled to: as, for example, if there be originally and in fact three joint tenants, and one of the three cease to be possessor, and the farm is held jointly by the other two, in this case neither of the other two are in possession of the entirety of anything; but each is in possession, within the Act, of more than his undivided share. On these grounds, I confess that I never entertained any doubt but that the present case came within the terms of the 12th section of the Act, the plaintiff and his brother Denis having each been in possession of the entirety of certain portions of the land held under the lease, and that cases like the present were precisely the cases intended to be provided for: any other construction would be attended with most extraordinary results. Suppose, for instance, that the entire farm demised by the lease of 1819 consisted of 100 acres, each of equal value, and that one of the two joint tenants had been in exclusive possession of seventy acres, and the other of only thirty, the plaintiff's argument would establish that the party having the seventy acres would be entitled to retain it, and also recover an undivided moiety of the thirty acres, because the seventy acres were more and the thirty less than their respective shares. But, even if there was any doubt on the question, the precise point, and on precisely the same grounds, has been decided by the Court of Exchequer, at Westminster, in the case reported in the *Law Journal*, to which I have referred. During the argument, some doubt was suggested as to the accuracy of the report of that case; and no doubt it is inaccurate in stating that the cause shown

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against the conditional order was disallowed; whereas it was in fact allowed; and the report is also not very distinct, in showing how the question on the statute arose in that case, as the joint tenancy created by the will of the testator did not arise till after the death of the widow, who lived till within far less than twenty years of the bringing of the ejectment. Under these circumstances, I took the liberty of writing to Baron Martin, who delivered the judgment of the Court on the subject, and he, in answer to my letter, has very kindly corrected the inaccuracies in the report of that case, and stated that the Court decided the question altogether on the 12th section of the Statute of Limitations; and that the question as to the widow's life estate having so recently determined, was out of the case in this way—she having never gone into possession of the four acres in question in the case, but having permitted her son and daughter to occupy each two acres of the four, the Court inferred that she had surrendered to them her life estate; and therefore that the joint estate created by the testator's will came into operation at the time of such supposed surrender; and therefore that the question on the Statute of Limitations arose in that case substantially in the same way as in the case before us; and that the Court came to the same conclusion, as I have already stated, we have. I may also mention that Mr. Baron Martin, in his letter to me—what I do not think we have acted on here, but which certainly is an improvement on our practice—that, whenever at a trial the Judge reserves liberty to have the verdict entered for plaintiff or defendant, not having submitted any question to the jury—that, in such reservation, it is always implied that the Court is to be at liberty to draw such inferences from the facts as in their opinion the jury ought to have drawn, if the question had been submitted to them; and, accordingly, in the case to which I have referred, the Court presumed that the widow had surrendered her life estate; being of opinion that the jury ought so to have found, in case the question had been submitted to them.

On the whole, therefore, on the authority of this case, and our own opinions, that it was rightly decided, we are of opinion that the verdict obtained by the defendant should stand, and the cause shown against the conditional order obtained by the plaintiff allowed.

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(*Exchequer.*)

Nov. 22, 25.

The consignor, in a bill of lading, loses his right of stoppage *in transitu*, upon the insolvency of the consignee, when, prior to the insolvency, the bill of lading has been transferred, by indorsement, to a purchaser for value, *bona fide*, and without notice of the consignee's insolvency. 18 and 19 *Vic.*, c. 111.

THIS was an action of trover, to recover the price of 700 bags of ryegrass seed.

The defendant pleaded:—First, a traverse of the plaintiff's ownership of the goods.

Secondly, a traverse of the conversion.

Thirdly—"That the plaintiff's only title to the goods was as assignee of a certain bill of lading, whereby the said goods had been consigned by the defendant to certain other persons; and the plaintiff took and received the said bill of lading, knowing that the goods were *in transitu*, and had not been paid for; and that a bill of exchange had been given, with nearly three months to run, for the price of the goods; and had notice, at the time of the indorsement of the bill of lading, that the purchasers were in insolvent circumstances, and that the said bill was not likely to be paid at maturity."

Fourthly—"That the plaintiff's only right to the goods was as the assignee for value of a certain bill of lading, whereby the said goods had been consigned by the defendant, the sender thereof, to certain other persons, the purchasers thereof; and before the time of the said assignment to the plaintiff, the defendant stopped the said goods *in transitu* (the purchasers being then insolvent), the price thereof then being, and still continuing, wholly unpaid."

The action was tried before FITZGERALD, B., at the Sittings after Trinity Term 1864. It appeared that the plaintiff was a corn merchant in Exeter. The goods in question were sold on shipboard, by the defendant, a merchant in Newry, to the Messrs. Seacombe, of Exeter, in January 1864. The defendant received a bill of

exchange, at three months, from the Messrs. Seacombe, for the price of the goods. The Messrs. Seacombe were indebted to the plaintiff; and, on the 13th of January 1864, he took the bill of lading, indorsed by them, at the value of £560. The Messrs. Seacombe were adjudicated bankrupts upon the 23rd of July 1864. The defendant got the goods into his possession before the 30th of January, and sold them.

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His Lordship refused to nonsuit the plaintiff at the request of the defendant's Counsel; and the jury found for the plaintiff, with £560 damages. Execution was stayed, with the plaintiff's consent, on the terms of the amount of the damages being lodged in Court, and leave to move for a new trial was reserved.

A conditional order for a new trial, pursuant to the leave reserved, having been obtained—

J. E. Walsh (with whom was *W. J. O'Driscoll*) now showed cause.

The vendor's right of stoppage *in transitu* was lost by the indorsement of the bill of lading to the defendant, *bona fide* for valuable consideration, and in ignorance of the consignee's insolvency: 18 & 19 *Vic.*, c. 111, s. 1 (Bills of Lading Act). The first section of that statute is explained by the preamble, which, in substance, states that the object of the Act is to vest in the assignee of a bill of lading all right of action upon it; to do away with the old law, as to *choses in action*, in this case, and to put bills of lading upon the same footing as bills of exchange: *Lickbarrow v. Mason* (a); *Abbot on Shipping*, pp. 408-9; *MacLachlan on Shipping*, p. 341.

This question has never been raised in England since the 18 and 19 *Vic.*, c. 111, became law.

J. A. Phillips, in support of the order.

A right to stoppage *in transitu* either arises from a contract to deliver, in the bill of lading, or it is a condition annexed to

(a) 2 T. R. 63; S. C., 1 H. Bl. 357; 6 East, 31; 2 Sm. L. C. 630-32.

M. T. 1864. it; therefore, in either case, the right of stoppage by the vendor
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PIGOT, C. B., read the following judgment:—

I found some difficulty, during the discussion of this case, in understanding the defendant's argument; and I am not sure that I yet rightly apprehend it. As far as I can collect, he relies upon the first section of the Bills of Lading Act, 18 & 19 *Vic.*, c. 111, which contains these words:—"Every consignee of goods named "in a bill of lading, and every indorsee of a bill of lading to "whom the property in the goods therein mentioned shall pass "upon or by reason of such consignment or indorsement, shall "have transferred to, and vested in him, all rights of suit, and "be subject to the same liabilities in respect of such goods, as if "the contract contained in the bill of lading had been made "with himself." And I understand the defendant's Counsel to contend that since, upon the insolvency of the consignee, the consignor would have had the right, as against the consignee, of stopping the goods *in transitu*, and since (as he contends) every indorsee "shall be subject to the same liabilities in respect of "the goods as if the contract in the bill of lading had been "made with himself," it follows that the consignor has a similar right of stoppage *in transitu* against every successive indorsee; in other words, he must contend, in this view of the Act of Parliament, that the rule laid down in the case of *Lichbarrow v. Mason (a)* is no longer law; and that, under the statute, the right of the consignor to stop *in transitu*, upon the insolvency of the consignee, exists, notwithstanding an indorsement made before the stoppage, by the consignee to a purchaser for value, taking the indorsement *bona fide*, and without notice of the consignor's insolvency.

It appears to me impossible to give such a construction to the 1st section of the statute, even if the 2nd section had not expressly

(a) 2 T. B. 63; S. C., H. & Bl. 367; 6 East, 21 n.

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provided that nothing in the Act should prejudice "*or affect*" any right of stoppage *in transitu*. The recital of the Act, coupled with its enactments, shows that the object of the Legislature was to extend, and not to abridge the rights of indorsees, and the protection which the law afforded to them. The purposes recited in the Act are two. The first is to remedy the inconvenience of the existing law, by which, according to the custom of merchants, the "property in goods" may pass by indorsement to the indorsee, but nevertheless "all rights in respect of the contract contained in the bill of lading continued" in the original shipper. The preamble recites that "it is expedient *that such rights should pass with the property.*" The second purpose of the Act (with which however we are not dealing here) was to make the bill of lading, in certain cases, conclusive evidence against the master or other person signing it, that the goods mentioned in it have been shipped on board the vessel, on board which they are by the bill of lading represented to have been shipped.

The first purpose of the Act is effected by the first section. It deals only with rights and liabilities arising from the contract contained in the bill of lading. The right of stoppage *in transitu* is not created by what is contained in that contract; it is entirely collateral to that contract. The contract contained in the bill of lading is merely an agreement by which the master or other person acting for the owner of the vessel stipulates, in consideration of the freight and other matters (usually primage and overage), to deliver the goods shipped by the shipper (or consignor), to the person named as consignee, or to his assigns, or to the shipper's order, or otherwise, according to the form adopted in the bill of lading. But the right of stoppage *in transitu* does not arise out of any contract between the master or owner of the vessel and the shipper or consignor of the goods: it arises out of the sale of the goods made by the consignor or shipper to the consignees, or to the indorsee of the bill of lading. Whether, as some have supposed, the right of stoppage *in transitu* is in effect a right, wholly or in part, to rescind the contract of sale, or is (according to other very high

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authorities) the exercise of a part of the old dominion of the owner and seller of the goods,—such dominion being retained until the goods shall have reached their destination, and have come into the possession of the consignee or buyer of the goods,—in either of these two views the interest in the bill of lading, by which the person who has signed it is bound to carry the goods according to its terms, remains unchanged and binding. In *Bloxam v. Saunders* (a), Mr. Justice Bayley treats the right of stoppage *in transitu* as a part of the dominion of the owner of the goods, who in selling them retains the possession of them until the price shall have been paid. “The buyer’s right in respect of the price,” he says, “is not a mere lien which he forfeits if he parts with the “possession, but grows out of his original ownership and dominion; “and payment or a tender of the price is a condition precedent on “the buyer’s part; and until he makes such payment or tender, he “has no right to the possession.” He then says:—“If the seller “has dispatched the goods to the buyer, and insolvency occurs, he “has a right, in virtue of his original ownership, to stop them *in “transitu.”* And he cites *Mason v. Lichbarrow* (b), and several other authorities. He then proceeds:—“Why? Because the pro- “perty is vested in the buyer, so as to subject him to risk of any “accident; but he has not an indefeasible right to the possession: “and his insolvency, without payment of the price, defeats that “right.” Other authorities lean to the view that the right to stop *in transitu* is a right to rescind the contract on the buyer’s insolvency.

The authorities at both sides are collected in the *note to Lichbarrow v. Mason* (c). In either view, it is a right arising from the relation of vendor and vendee, and it is not created by a mere bill of lading. And if it be not, there is no colour for the argument that the 1st section of the Bills of Lading Act (18 & 19 Vic., c. 111) preserves to the vendor and consignor the right to stop *in transitu*, after the consignee has transferred the bill of lading to a *bona fide* indorsee for value, without notice of the consignee’s insolvency;

(a) 6 B. & C. 948. This case was not cited in the argument.

(b) 1 H. Bl. 357.

(c) Sm. L. C. 630, 632.

a right which ever since the case of *Lickbarrow v. Mason* has been treated by all our Courts of Justice, as well as by the whole mercantile community, as destroyed by such an indorsement. I must add that, without any reasoning upon the subject, I should be disposed to the opinion that the Legislature would not, otherwise than by express and clear enactment, have made so large and important a change in the commercial law of the land. But, for the reasons which I have here stated, it appears to me that the argument addressed to us, founded upon the terms of the 1st section of the statute, wholly fails.

It is hardly necessary to refer to the 2nd section. I think it affords an additional reason for holding that the Legislature had no intention of altering the law in reference to the right of stoppage *in transitu*.

In a case reported in 11 *Com. Bench, N. S.*, p. 842 (a) [*Smurthwaite v. Wilkins*], an attempt was made to give a singular construction to the 1st section of this Act of Parliament. That was an action for freight, brought by shipowners against intermediate indorsees of a bill of lading. The question arose upon demurrer. It appeared upon the pleadings that the plaintiffs had made a bill of lading, by which the cargo was to be delivered to Schroder and Co., or their assigns, paying freight for the cargo. The defendants in the action purchased the cargo for a valuable consideration, which was paid, and obtained an indorsement of the bill of lading; and subsequently sold the goods, and indorsed the bill of lading to other parties. The plaintiffs contended that, although the defendants had parted with all property and interest in the goods (the transaction of the transfer not being in any manner impeached), the defendants were nevertheless liable to the freight. In support of this view, the plaintiff's Counsel contended (in a way not very dissimilar to that which was pursued in the argument before us) that every indorsee of the bill of lading through whose hands the property in the goods may have passed was liable for the freight, by force of those words of the 1st section of the statute by which the property in the goods, and all rights of suit, were transferred

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to the indorsee, "subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." The Court, without hearing the argument of defendant's case, decided against the plaintiff, holding (in the language of Lord Chief Justice Erle that, "Looking at the whole statute, the obvious meaning is, that the assignee *who receives the cargo* shall have all the rights and bear all the liabilities of a contracting party; but that, if he passes on the bill of lading by an indorsement to another, he passes on all the rights and liabilities which the bill of lading carries with it." The language of Mr Justice Williams is very closely applicable to the case before us:—"The general scope of the Act is, that whereas before, by the custom of merchants, the property in the goods passed by the indorsement and delivery of the bill of lading; now, all the rights and liabilities of the consignor under the contract shall pass with the property—that is, that *where the right of property leaves the party, the rights and liabilities under the contract shall leave him also.*"

A case occurred very recently (in January 1863), in the Court of Admiralty in England—the case of "*The Tigress*," reported in 32 *Law Jour., Admiralty Cases*, p. 97 (a), before Doctor Lushington; and, when I name that most able and accomplished Judge, let me add that I cite one of the very highest authorities on this branch of the law. There the plaintiffs, consignees of a bill of lading, which was framed in three parts, indorsed one of them, as vendors of the goods, to a person named Bushe, as vendee, who became insolvent. Before any delivery of the goods to Bushe under the first indorsement, and before any demand of the goods was made by or under him, of the master, the plaintiffs learned the fact that Bushe was insolvent; and they thereupon indorsed another part (or duplicate) of the bill of lading, making the goods deliverable to their own order; and caused a demand of the goods to be made under it (that indorsement) of the master of the vessel, with an offer to him of indemnity against any claim of Bushe under the

(a) This case was not cited in the argument.

indorsement made to Bushe. The master refused to deliver the goods in pursuance of this demand; and the plaintiffs filed their petition in the Court of Admiralty, for the purpose of recovering, by arrest of the ship, damages for the refusal of the master to deliver the cargo. The plaintiff's demand in the suit was resisted, in argument before the Court, upon the ground (among others) that the plaintiffs had not shown in their petition what had become of the outstanding indorsement to Bushe, and that this omission constituted a fatal defect in their title to maintain the suit. Doctor Lushington held that it was only necessary for the plaintiffs against the master, and with a view to stoppage *in transitu*, to assert their title as vendors and owners of the goods, and that the master was bound to give effect to the plaintiff's claim, unless he was aware of a legal defeazance of that claim; and that it lay on him to show it. Doctor Lushington said:—"Were the vendor obliged formally to prove his title to exercise the right of stopping *in transitu*, that right would be worthless, for the validity of a stoppage *in transitu* depends upon several conditions. First, the vendor must be unpaid; secondly, the vendee must be insolvent; *thirdly, the vendee must not have indorsed over for value.* But the proof that these conditions have been fulfilled would always be difficult for the vendor, often impossible." This judgment was delivered more than seven years after the passing of the Bills of Lading Act; and it shows that it had not entered into the thoughts of Doctor Lushington that, by the operation of that statute, the right of stoppage *in transitu* was preserved to the consignor after the consignor's vendee, who was the consignee or indorsee of the bill of lading, had indorsed it once to a third party, taking the indorsement *bona fide* for value, and without notice of the insolvency of the vendor.

We are of opinion that the rule of law as to stoppage *in transitu*, laid down in *Lickbarrow v. Mason*, remains wholly unaffected by the Bills of Lading Act (18 & 19 Vic., c. 111); that the direction given by my Brother FITZGERALD to the jury in this case was perfectly correct, and that there is no ground whatever for disturbing the verdict.

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I have thought it right to state my reasons for my judgment in this form, because, although the case appears to be wholly free from the least cause for doubt, I nevertheless think it desirable to meet every attempt made in a Court of Justice to shake settled principles of commercial law, by a deliberate decision, announced in a shape in which it is not likely to be misunderstood.

Cause shown allowed.

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April 21.

DANIEL MURPHY v. HUGH POLLOCK and
JAMES W. POLLOCK.

In an action against a master, by a servant, for injuries sustained by reason of the incompetence of a fellow-servant, or the negligence of the master, there must be more than *some evidence* of negligence. Mere conjecture and facts consistent with pure accident, and with an error of judgment, as well as with negligence, should not be sent to the jury.

THIS was an action brought by the plaintiff, as administrator of his deceased son Daniel Murphy, to recover damages under Lord Campbell's Act (9 & 10 Vic., c. 93) for his son's death, caused by the explosion of a steam-engine of the defendants, while the deceased was working the engine, in the employment of the defendants.

The summons and plaint contained four counts. The first count complained that the defendants were possessed of a rope factory and mill, and steam-engine and machinery therein; and deceased was employed in the factory; and the defendants of themselves so negligently, carelessly and improperly conducted themselves in and about the management of the steam-engine and machinery, that the engine exploded, and he was nearly killed.

The second count complained that the defendants were possessed of a certain factory and mill, and of a certain steam-engine and machinery therein; and the deceased was employed by the defendants in the factory; and the defendants so negligently, carelessly and improperly conducted themselves by neglecting, and omitting to employ competent persons to work and manage said engine and machinery, and by employing servants who were incompetent and unfit for said work and management, as the defendants well knew,

but of which the deceased was ignorant, that by reason of the defendants' negligence, &c., &c., the steam-engine exploded and the deceased was killed.

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The third count complained that the defendants were possessed, &c. &c., and the deceased was employed, &c., &c., and the defendants so negligently and carelessly conducted themselves, by providing a defective steam-engine and machinery, of which the defendants knew, but of which the deceased was ignorant; and by reason of the said negligence and carelessness, said steam-engine exploded, whereby he was killed.

The fourth count complained that the defendants were possessed of, &c., &c., and the defendants so carelessly, &c., &c., conducted themselves, by themselves and their servants, in and about the management and use of the said steam-engine and machinery, that by reason thereof the steam-engine exploded, whereby he was killed.

To the *first* count the defendants pleaded:—

1. That they did not personally manage the engine.
2. That there was no such negligence, &c., &c., on the part of the defendants.
3. That the engine did not explode through their negligence.
4. That the engine was under the sole and exclusive conduct, control and management of the deceased, as servant and manager thereof; and that the defendants did not personally interfere with the management thereof; and that it exploded while so under the sole and exclusive control, conduct and management of the deceased.
5. That the explosion of the engine was proximately caused by the negligence, &c., &c., of the deceased as defendants' servant and manager.

To the *second* count the defendants pleaded:—

1. That they did not neglect to employ a competent person in their factory.
2. That they had no such knowledge as alleged.
3. That there was no such ignorance on deceased's part as alleged.

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4. That the servant employed by the defendants to work and manage the engine was Daniel Murphy himself, and that the explosion took place under and through his own working and management.

5. That defendants employed Daniel Murphy to work, control and manage the engine; and they did not personally interfere; and that the engine exploded while he worked it under his sole and exclusive control and arrangement.

6. That the explosion was proximately caused by the negligence of Daniel Murphy, as the manager and servant of the defendants.

To the *third* count the defendants pleaded:—

1. That there was no such negligence upon their part as alleged.
2. That the defendants did not provide a defective engine or machinery.
3. That they did not know that the engine or machinery was defective.

4. That the deceased had the same means and opportunity as the defendants of knowing of said alleged defective condition of said steam-engine and machinery, and accepted and continued in said employment with such means and opportunity of knowledge, until killed, as in said count is mentioned.

5. That the engine did not explode by reason of the defendants' negligence.

6. That the explosion was directly caused by the negligence and carelessness of the deceased, as manager of the engine.

To the *fourth* count the defendants pleaded:—

1. That there was no such negligence on their part as alleged.
2. That the engine did not explode by reason of the negligence in that count alleged.

3. A defence similar to the fourth to the first count.

4. A defence similar to the fifth to the first count.

The action was tried before Keogh, J., at the Summer Assizes for the city of Cork 1862.

At the trial, Owen Murphy, brother of the deceased, stated that he worked with the deceased in the defendants' rope factory. "Went

"to work at six o'clock, A.M., on the 26th of May last. Saw his brother at the engine. Saw Patrick Linehan the head foreman of the factory there. Linehan was in a linney near the engine-room, about a fathom from it. Linehan was able to take the men and break them. My brother was under his orders. There was a conversation between them." [This conversation was objected to, and admitted, subject to the objection]. "My brother asked Linehan would he let off the steam and see what was the matter with the engine. The steam guage was off then. Linehan said not to do so, as he was going to start it. I went away, and in about ten or eleven minutes the steam-engine exploded. My brother died in ten days." [It was admitted that the deceased died in consequence of the explosion]. "Recollects when the former engine was there; a boy took care of it, and he was broken. Patrick Linehan was with the engineers at the new engine, and with my brother. After it was finished, saw Linehan settling the bolts of the engine and setting it to work. My brother was taking care of the gas-works. He was five or six weeks at the engine. Mr. Pollock was at the infirmary with my brother. Mr. Pollock asked him was the boiler full of water, and he said it was."

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Daniel Murphy, the plaintiff, stated that the deceased always gave his wages to him. No other evidence was given for the plaintiff.

The defendants' Counsel called for either a nonsuit or a direction. The Counsel for the plaintiff admitted that there was no evidence to sustain the first, third, and fourth counts; but contended that there was evidence to sustain the second count. His Lordship, being of that opinion also, directed the jury, if they believed the evidence, to find for the plaintiff upon each and every issue raised on the second count. The jury found for the plaintiff with £30 damages. His Lordship reserved leave to the defendants to move to have the verdict entered for them. A conditional order in the terms of the leave reserved having been obtained—

C. Barry and *W. O'Brien* now showed cause.

Linehan, who had charge of the steam-engine, and who was head

H. T. 1863. manager of the defendants' factory, was guilty of negligence. He started the engine after the deceased had warned him that there was an unusual quantity of steam in the boiler. Linehan was not a competent person to have charge of the engine. The jury have found that the defendants were aware of his incompetence. They are therefore liable to the plaintiff for the negligence of the fellow-servant of the deceased. *Per* Byles, J., in *Glarke v. Holmes* (a); *Hutchinson v. The York, Newcastle and Berwick Railway Co.* (b); *Wigmore v. Jay* (c); *Bartonshill Coal Co. v. Reid* (d); *Roberts v. Smith* (e), *per* Willes, J.; *Skinner v. The London, Brighton and South Coast Railway Co.* (f); *Carpue v. The London and Brighton Railway Co.* (g); *Hammack v. White* (h); *Weems v. Mathieson* (i).

O'Riordan and Serjeant *Sullivan*, in support of the order.

No evidence was given at the trial of the defendants' knowledge of Linehan's incompetence. Therefore the defendants were entitled to have had the verdict entered for them, as that issue went to the whole cause of action. Nor was any evidence given of the personal negligence of the defendants; therefore this case is governed by *Dynen v. Leach* (k); *Tarrant v. Webb* (l); *Toomey v. The London, Brighton and South Coast Railway Co.* (m); *Ormond v. Holland* (n); *Searle v. Lindsay* (o); *Mellors v. Shaw* (p); *Cotton v. Wood* (q).

W. O'Brien, in reply.

Cur. ad. ault.

Feb. 12.

The Court was equally divided.

(a) 7 Exch. 949.

(c) 5 Exch. 353.

(e) 2 H. & N. 213.

(g) 5 Q. B. 747.

(i) 4 Macq. 215.

(l) 18 C. B. 797.

(n) ELL, B. & E. 102.

(p) 1 B. & Sm. 437.

(b) 5 Exch. 343.

(d) 3 Macq. 266.

(f) 5 Exch. 187.

(h) 11 C. B., N. S., 568.

(k) 26 L. J., Exch., 221.

(m) 3 C. B., N. S., 146.

(o) 11 C. B., N. S., 429.

(q) 8 C. B., N. S., 508.

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This case comes before us on a motion to enter a verdict for the defendant, pursuant to the leave reserved by Mr. Justice Keogh. The action was brought by the plaintiff, who is the administrator and father of Daniel Murphy deceased, to recover damages for the death of his son.

The second count alleges that the defendants were guilty of negligence, in neglecting and omitting to employ competent persons to work and manage their steam-engine, and by employing incompetent persons to work and manage it, as they well knew, but of which Murphy was ignorant; and that, by reason of such negligence and improper conduct, the steam-engine exploded, and Murphy was killed.

Two of the issues raised upon the pleadings were, whether there was such neglect or omission on the part of the defendants as in the second count alleged, and whether the defendants had such knowledge as in the second count alleged.

The jury found a verdict for the plaintiff upon both those issues; and the question for our consideration is, whether there was any evidence to warrant those findings.

With respect to the general rule of law applicable to cases of this description there is no controversy. According to *Priestley v. Fowler* (a), a master is not responsible for injuries occasioned to his servant by the negligence of another person in his employment as a fellow-servant; and according to *Hutchinson v. York, Newcastle and Berwick Railway Company* (b), and *Tarrant v. Webb* (c), he is not answerable for injuries to a servant caused by the incompetency or unskilfulness of another person in his employment, provided he exercised due and reasonable care in the employment of such person: but he is bound to exercise such due and reasonable care in the employment; and if he fail in the exercise of that due and reasonable care, then there is a neglect of duty towards the injured servant, for which he may be made liable in damages. The only question before us is, whether the

(a) 3 M. & W. 1.

(b) 5 Exch. 343.

(c) 18 C. B. 797.

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I am of opinion that there was such a *prima facie* case, as, in the absence of any evidence on the part of the defendants, warranted the finding of the jury. The evidence shows that the deceased was employed to take care of the engine, under the orders of Linehan; that he called the attention of Linehan on the morning of the accident to something being wrong with the engine, and suggested to Linehan the propriety of letting off steam, in order to ascertain what was wrong with the engine; but that Linehan disregarded his suggestion, and started the engine; and that in a few minutes afterwards the explosion took place, which killed the deceased.

I think the fair inference from that evidence is, that the explosion was caused by the act of Linehan in starting the engine, which appeared to be a new engine, and free from any defect, according to the finding on another issue; and if so, I think it was evidence of his incompetency to manage the engine. It cannot fairly be ascribed to mere negligence on his part, for his attention was expressly called to it by the deceased; and must rather be ascribed to his not being possessed of sufficient knowledge of the construction of the engine, or of sufficient skill to be able to control and regulate its working with safety. At any rate, I think it was evidence from which, unexplained, the jury might not unreasonably draw that conclusion.

If that be so, then I think it is evidence that the defendants were guilty of the negligence imputed, and that it cast upon them the onus of showing that they had exercised due and reasonable care in the employment of Linehan. The mode and circumstances of his situation and employment were matters peculiarly within the knowledge of the defendants, and of which the plaintiff was necessarily ignorant. If it were not, it would be practically impossible for any servant sustaining such an injury to maintain any action against his master, however negligent or careless that master might have been in the selection of those with whom that servant was

associated, and whose orders, as in the present case, he was bound to obey. On the other hand, in holding that proof of incompetency of the employee to do the duty assigned to him is *prima facie* evidence of want of care on the part of the employer in employing him, does no injustice to the master, because he can always explain the circumstances under which the employment arose, the knowledge which he had, and the reasons which induced the employment of the person complained of. I am therefore of opinion that there was evidence to go to the jury on the issue as to negligence, and that the verdict on that issue cannot be disturbed.

With respect to the second issue, whether the defendants knew of Linehan's incompetency, I think also that there was a *prima facie* case to go to the jury. That also is a fact lying peculiarly within the knowledge of the defendants, and of which the plaintiff could be expected to give only slight evidence. If I be right in thinking that there was evidence of Linehan's incompetency, I think that the fact of their employing and retaining in their employment an incompetent person is evidence from which a jury might fairly infer that the persons who so employed and retained him were aware of his unfitness for the duties assigned to him. I may add that it appears, by the Judge's notes, that Linehan was not an engineer; that there had been an engineer some time previously in the employment of the defendants, and that Linehan was "with him," that is, as I understand, acting under him in working the engine in question.

I may add that the LORD CHIEF BARON concurs in this view of the case.

FITZGERALD, B.

The substance of the evidence given to the jury in this case appears to me to have been:—The deceased was in the employment of the defendants. His business was to attend to a steam-engine in the defendants' factory. It was his duty to obey the orders of a person named Linehan, the defendants' foreman. On the day of the occurrence which resulted in the death of the deceased, he suggested to Linehan that something was wrong

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with the engine, or the gauge of the engine. Linehan, notwithstanding, directed the engine to be started. An explosion very shortly afterwards followed, from which the deceased received an injury, which it is admitted was the cause of his death. This evidence was offered to sustain the issue—that the injury was caused by the want of reasonable care of the defendants in employing competent workmen, or by their employing workmen whom they knew to be incompetent. The service which this evidence had to perform was to satisfy the jury—first, that something was wrong with the engine; secondly, that the starting of the engine, while in this defective state, was the cause of the injury; thirdly, that Linehan's direction that the engine should be started, without having examined into the alleged defect, was want of ordinary skill and care on his part, as distinct from mere error of judgment or negligence; and, fourthly, that there was want of reasonable care on the part of the defendants in employing the person so deficient in ordinary skill or care, or that the defendants knew of his incompetency.

Besides the deceased's suggestion, there was no evidence that anything was wrong with the engine. No evidence was given as to the kind of injuries to the gauge, which would be likely to result in an explosion of the engine. There was no evidence besides of any unskilfulness or error on the part of Linehan in his business. There was no evidence as to the extent of the defendants' interference in the business carried on by them, or as to the extent of Linehan's duties.

Assuming that out of the various causes which may have produced the explosion, there was in this evidence something from which a reasonable mind might have legitimately inferred that its cause was a fault in the engine observed by the deceased, and the starting of the engine while this defect was unremedied, I feel the greatest difficulty in perceiving how, in the absence of any direct evidence as to the existence or appearance of defect, the neglect of the suggestion can be considered evidence of want of ordinary skill or care in Linehan. I can conceive that, even the single act of a man may be evidence—nay, satisfactory evi-

dence of incompetence; but it seems to me that this is where the act is of such a nature, or done under circumstances such that the doing of it may be reasonably thought only accountable for on the supposition of malice, which is not to be presumed, or incompetence.

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Here, we know absolutely nothing of the nature of the defect suggested, and that a fatal consequence resulted from it is not a circumstance which will make the act more evidence of incompetence than if no such consequence had taken place. Suppose the explosion to have taken place, the facts being as stated, except that no injury to any person had resulted, and that in an issue found as to the incompetence of Linehan, the sole evidence was that on the one occasion he had not attended to the suggestion of a workman that something was wrong, but had, notwithstanding the suggestion, directed the engine to be worked; would a Judge be warranted in telling a jury that this was evidence of incompetence? I confess I cannot but doubt this. Assuming, however, that a reasonable man might, from this single instance, reasonably infer want of ordinary skill and care in Linehan, will incompetence thus inferred from a single act in a man, as to whose conduct on other occasions there is no evidence, be itself evidence from which a reasonable man can infer want of reasonable care on the master's part in selecting him, or knowledge of his incompetence? I cannot go this length, and therefore am of opinion that the rule ought to be made absolute.

HUGHES, B., concurred with FITZGERALD, B.

*Exchequer Chamber.**

The case subsequently came before the Exchequer Chamber, in Easter Term 1864.

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FITZGERALD, J., delivered the judgment of the Court.

In this case we are called upon to determine two questions,

* *Coram* LEFROY, C. J., MONAHAN, C. J., O'BRIEN, J., BALL, J., HAYES, J., CHRISTIAN, J., KEOGH, J., and FITZGERALD, J.

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upon the evidence adduced at the trial—first, whether the servant employed by the defendants was incompetent; secondly, whether the defendants were aware of his incompetence. No rule of law is better established than that which measures the responsibility of a master for the acts of his servant. That rule is accurately expressed by Hill, J., when at the Bar, in his argument in *Ormond v. Holland (a)*; and the Judges of the Court of Queen's Bench expressed their approval of his summary of the law upon the point in question, which is as follows:—"The master, in the absence of a special contract, is not liable to his servant, unless it can be shown that the master was himself guilty of negligence. If he personally interferes, and is guilty of negligence, he is liable; or if he negligently chooses incompetent servants, and in consequence of their incompetence the accident occurs, he is liable for his own personal negligence in choosing such servants. But unless some neglect be brought home to him personally, he is not responsible for the consequences of an accident occurring to a servant in his employment."

There was no special contract here between the deceased and the defendants; and their duty, as ordinary masters, is correctly defined by Lord Cranworth, then Lord Chancellor, in *The Bartonshill Coal Company v. Reid (b)*. He there says:—"With reference to the law of England, I think it has been completely settled that, in respect of injuries occasioned to one of several workmen engaged in a common work (and I know of no distinction whether the work be dangerous or not dangerous), the master is not responsible if he has taken proper precautions to have proper machinery and proper servants employed."

The onus of proof, in the present case, upon both the questions raised, lay upon the plaintiff. The party who asserts a proposition is bound to prove it; and the other party is not called on to give any evidence to deny it until his adversary has given some evidence in support of it. *Potior est conditio defendentis*. Here the defendants were not called upon to prove Linehan's competence until some evidence of his incompetency had been given.

(a) Ellis, B. & E., 102.

(b) 3 Macq. 266.

Before proceeding to examine the evidence, I may advert to the principles laid down in the Courts of Law and in the House of Lords, as to the *quantum* of evidence requisite. In *Cotton v. Wood* (a), Chief Justice Erle adverts to the judgment of Mr. Justice Williams, in another case in that Court—*Toomey v. The London, Brighton and South Coast Railway Company* (b):—"It is not enough to say that there was *some* evidence: a scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the Judge in leaving the case to the jury." And Mr. Justice Williams, in delivering judgment in *Cotton v. Wood*, says:—"I wish merely to add, that there is another rule of the laws of evidence which is of the first importance, and is fully established in all the Courts, viz., that, where the evidence is equally consistent with either view—with the existence or non-existence of negligence,—it is not competent to the Judge to leave the matter to the jury. The party who affirms negligence has altogether failed to establish it. That is a rule which ought never to be lost sight of."

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In *M'Mahon v. Lennard* (c), when the question was whether there had been any evidence to go to the jury, Mr. Justice Wightman says:—"It may be fit to consider what is to be understood by the expressions 'any' evidence or 'no' evidence to go to the jury. The reasonable rule appears to be that expressed by the Court of Exchequer Chamber, in the case of *Avery v. Bowden* (d), in accordance with the opinion of Lord Tenterden, 'that if the evidence was such that the jury could conjecture only, 'and not judge, it ought not to go to the jury;' that the onus was on the party offering the evidence; and that if he only offered evidence consistent with either supposition or fact, he was not entitled to have it put to the jury." Bearing these principles in mind, let us consider what was the evidence, in this case, of the incompetence of the deceased fellow-servant, and of the defendants' knowledge of it, to go to the jury; or, in other words, did the plaintiff prove the proposition which it lay upon him to establish?

(a) 8 Com. B., N. S., 568.

(b) 3 Com. B., N. S., 146.

(c) 6 H. of L. Cas. 970.

(d) 6 Ell. & B. 973, 974.

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As no special contract existed between the deceased and the defendants, the responsibility of the latter arises from duty, and duty only—*i. e.*, their duty to employ competent workmen and fit machinery, in a service attended with some danger. There is no evidence that the defendants personally interfered.

Owen Murphy was the principal witness examined by the plaintiff. His evidence was as follows :—"The deceased was my brother. Worked at the same place with him. Went to work on the 26th of May last. Was hackling hemp. Saw all the men; and my brother the deceased was at the engine; he left for the factory at five o'clock. Witness left at half-past five. Saw Patrick Linehan, the head foreman of the factory, then. It is a rope-factory. Saw Linehan in a linney, near the engine-room, about a fathom from it. Linehan was able to take the men, and break them."

I pause here to examine the argument advanced by the plaintiff—viz., that the above statement was evidence of neglect on the part of the defendants. But no evidence was given of Linehan's incompetence as an engineer; and if Linehan was not an engineer, evidence that he was not competent to conduct and work a steam-engine might have been given. I do not think that the above statement involves any presumption of Linehan's incompetence. I would arrive at an opposite conclusion. And, from the fact of Linehan's being called the head-foreman of a factory which was worked by a steam-engine, I would (if at liberty to do so) infer that the defendants had employed a competent person.

The witness then continues :—"My brother was under his orders. There was a conversation between them. My brother asked Linehan would he let the steam off, and see what was the matter with the engine. The steam-guage was off then. Linehan said not to do so, as he was going to start it. I went away, and in about ten or eleven minutes the steam-engine exploded. My brother died in ten days. Recollects when the former engine was there. A boy took care of it, and he was broken. Patrick Linehan was with the engineers at the new engine, and with my brother. After it was finished, saw Linehan settling the bolts of the engine, and setting it to work. My brother was taking care

"of the gas-works. He was five or six weeks at the engine. Mr. Pollock was at the infirmary with my brother. Mr. Pollock asked him was the boiler full of water, and he said it was."

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Now, the inference from the question which the deceased asked Linehan is, that something had gone wrong with the engine. What that was, nobody knows. Something must have gone wrong with the engine when it was under the charge, and in the hands of, the unfortunate deceased; but it was not even attempted to be shown that the steam-gauge being off was a defect in the engine. It was not proved that the engine was ever started; it is merely shown that it exploded in ten minutes after the conversation took place between Linehan and the deceased. We are called upon to hold that Linehan was guilty of neglect, upon the evidence which I have stated. I am very far indeed from being satisfied that there was any neglect on Linehan's part. When he said that he was going to start the engine, he probably intended to examine what was wrong with the engine before he started it, but the engine exploded before he could do anything. To hold that his not blowing off the steam was more than an error, would be impossible; and even to treat his conduct as an error of judgment, is descending to mere speculation. I do not think the evidence goes to show even an error of judgment. We must ever guard against confounding evidence with conjecture. Were I to speculate here, my conclusion would be, that something had gone wrong with the engine, in consequence of the neglect or mismanagement of the deceased; that, before that defect could be rectified, the accident took place. Upon the evidence, I only find a fact which may be consistent with neglect on the part of the deceased, an error of judgment on the part of Linehan, or the bursting of the engine from causes which might have been explained by scientific witnesses; or a defect in the engine.

I have stated all the evidence relative to the accident; but the plaintiff laid great stress upon one sentence uttered by Owen Murphy—that in which he said that he recollected "when the former engine was there; a boy took care of it." I infer that that boy had occupied the same position in the factory as the deceased. "Patrick Linehan was with the engineers at the new

E. T. 1864. engine, and with my brother." The plaintiff relied upon that sentence, as evidence that Linehan was not a duly qualified engineer. I cannot think that it is evidence of his incompetency. **Exch. Chanc.** **MURPHY** **v.** **POLLOCK.** The engineers there mentioned were the persons who put up the engine, and were competent to assist Linehan in the construction of the engine. "After it was finished, saw Linehan settling the bolts of the engine, and setting it to work. My brother was "five or six weeks at the engine." From this evidence I would speculate (if allowed) that Linehan superintended the putting up of the new engine; that he could work it; that the deceased could work it also, having had five or six weeks' experience and practice; and that the deceased was the person employed to work the engine under the directions of Linehan.

The concluding sentence of Owen Murphy's evidence was gravely pressed upon us as a ground for inferring that the defendants knew so well that Linehan was incompetent, that they would not ask him about the state of the engine, but went to the bedside of the deceased. But the defendants really went to the person who was best informed on the subject—who was at the engine,—and asked that question to ascertain whether the boiler was full or not. Coupling these facts with the cases of *Cotton v. Wood* (a) and *M'Mahon v. Lennard* (b), and the rules of evidence therein laid down, I am of opinion that, in the present case, there was not a scintilla of evidence to go to the jury of negligence on the part of the defendants; and that there was nothing proved in the case which was not consistent, as well with an error of judgment on the part of Linehan as with pure accident; and that being so, the rule is clear.

Had this case come before us upon an application to set aside the verdict below, as against evidence, we would have set it aside. There was no evidence to show that the defendants kept Linehan in their employment, knowing that he was incompetent. The verdict below should have been directed for the defendants.

The other Members of the Court concurred.*

(a) 8 Com. B., N. S., 568.

(b) 6 H. of L. Cas. 970.

* NOTE.—See also *Waller v. The South Eastern Railway Co.* (32 Law J., Exch., 205); *Morgan v. The Vale of Neath Railway Co.* (33 Law J., Q. B., 260); and *Lovegrove v. The London, Brighton and South Coast Railway Co., and Gallaher v. Piper and another* (10 Jur., N. S., 879).—REPORTER.

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Queen's Bench

THOMAS WALTER POOLE

v.

CHRISTOPHER DARBY GRIFFITH, and others.

*(Queen's Bench).*Jan. 15, 16,
20, 24, 31.

EJECTMENT on the title for all that the mountain and lands of Scart, containing by survey 1342a. 1r. 20p., or thereabouts, the cultivated portions of which are now in the possession and occupation of Michael O'Brien, &c., with all common of pasture thereunto belonging and appertaining, in the parish of Modeligo, in the barony of Decies-without-Drum, and in the county of Waterford; and the defendants wrongfully assumed the possession thereof, and still withheld the same from the plaintiff.

In fact, the defendants were of three classes; first, Christopher Darby Griffith, who took defence in the usual statutable form for all the premises: secondly, certain gentlemen who claimed some trust estate derived under C. D. Griffith; these defendants, in like manner, jointly took defence for all the premises: thirdly, a number of occupiers of small portions of the lands comprised in the land; these defendants filed separate defences, each for his own holding.

Subsequently, by consent of the parties, all these defences were, by orders of the Court, consolidated with the defence of C. D. Griffith, liberty being reserved to the several defendants to make separate defences at the trial.

Ejectment on Title for the mountain of S. By fee-farm grant, one of the defendant's granted certain lands to the plaintiff, "together with the mountain and common therewith held and enjoyed before the time of the making of a" certain lease. By patent of 1669, Charles the Second granted lands, of which the lands in the fee-farm grant formed part, to the ancestors of G., "with a proportional part of the unprofitable lands belonging to the said towns and lands, according to the number of

profitable acres adjudged by Commissioners' certificate."—*Held* that the words in the fee-farm grant granted an undivided proportional share in the mountain, in the proportion that the lands in the fee-farm grant bore to the lands in the patent.

Held, overruling the Court of Queen's Bench, that execution of, and payment of rent under lease, raises presumption of possession under such lease, so as to bar the Statute of Limitations.

Held also, that the Book of Distributions is evidence of title.

Held, by PROOT, C. B., that a grant made to K., in trust for and on behalf of G., a lunatic, does not make K. a trustee within the 17th section of the Renewable Leasehold Conversion Act.

Held also, by PROOT, C. B., that if a lessee allows his right against trespassers to be barred by the Statute of Limitations, such right may be revived by fee-farm grant on the expiry of the lease.

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At the Waterford Summer Assizes 1862, the case came on for trial before the Lord Chief Baron and a special jury. The plaintiff tendered in evidence an attested copy of the following extract from the Book of Distributions:—

No. in the Roll.	Proprietors' Names in 1641.	Denominations.	No. of Acres.		No. Profitable acres disposed.	To whom disposed.
			Unprofitable.	Profitable		
208						
County Waterford, Ardmore Parish aforesaid, Deicies Barony.						
58.	John Fitzgerald of Fernane.	Modelgo Parish. Grangebegg and Grangemore.		896 3 00	{ 256 3 24 422 2 05 055 2 08 126 2 27 035 1 16	Robert Beard. Robert Robins. John Stephenson. Eliza. and William Winston. John Levering.
58m.	The same . .	of ye same. .	1084 2 00			

The above extract was received in evidence, subject to an objection made by the defendants' Counsel, upon the ground that the Book of Distributions was not evidence as between the parties in this suit.

The plaintiff then gave in evidence an attested copy of an extract from the Down Survey. This copy of the extract was described as a trace "truly taken from the Down Survey Map of 'The Barony "' of Deeces, in the County of Waterford, admead by Francis "' Cooper, anno 1657,' preserved with other maps of the same "description" in the Quit-rent office. On one portion of this map are the figures "58," and the words "Graigebeg & Graigemore." On an adjoining portion are "58m," with the words "coarse heath mountaine."

The plaintiff next gave in evidence an attested copy of a patent, dated the 20th of July 1668, from King Charles the Second to Robert Beard and others. That patent granted "to the said Robert " Beard, in Graigebegg and Graigemore, 256a. 3r. 24p., profitable " land, plantation measure, retrenched by Thomas Brightwell, with " a proportionable part of the unprofitable lands belonging to the " said towne and lands, according to the number of profitable acres

"adjudged to him by the aforesaid certificate of our said Commissioners." After granting to the same Robert Beard other lands of a different denomination, the patent granted "to the said Robert Robins, in Graigemore and Graigebeegg aforesaid, 422a. 2r. 5p., "profitable land, plantation measure, retrenched by the said Thomas Brightwell, with a proportionable part of the unprofitable lands belonging to the said towne and lands; and to the said John Stephenson, in Graigemore and Graigebeegg aforesaid, 74a. and "11p. profitable land, plantation measure, retrenched by the said Thomas Brightwell, with a proportionable part of the unprofitable lands belonging to the said towne and lands; and to the said Elizabeth Winston, and William Winston, her son, in Graigemore and Graigebeegg aforesaid, 126a. 2r. 27p. profitable land, "plantation measure, retrenched by the said Thomas Brightwell, "with the proportionable part of the unprofitable lands belonging "to the said towne and lands; all lying and being in the barony "of Decies, and county of Waterford, in our said Kingdome of "Ireland." Each of the first three grantees was to have and to hold the lands [together with their rights, members and appurtenances] granted to him, "his heirs and assigns, for ever, to the onely use, benefit, and behoofe of him the said," &c., "his heirs and assigns, for ever." The fourth portion was granted "to have "and to hold one full third part of the aforesaid lands . . . together "with their rights, members and appurtenances whatsoever; the "same in three parts equally to be divided to her the said Elizabeth Winston, for and during her naturall life; and to have and "to hold the two-third parts of the said last mentioned lands in "Graigemore and Graigebeegg; and the remainder of the whole, "after the death of the said Elizabeth, to him the said William Winston, his heirs and assigns, for ever, to the onely use," &c.

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The plaintiff then (by consent) gave in evidence a copy of a lease of the 19th of September 1701, made between Katherine Beard, widow and relict of John Beard deceased; John Beard, a minor, son and heir apparent of the said John Beard deceased, by his mother and guardian, the said Katherine Beard; and Michael Wicks, of the one part; and Robert Cook, of the other

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part. The parties of the first part thereby demised to "Robert Cook, his executors, administrators and assigns, all that the share, lot, and portion of or belonging to the said Katherine Beard, John Beard and Michael Wicks, lying and being in Graigemore and Graigebegg, containing two hundred fifty and [a blank] acres, three roods, and twenty-four perches, be they more or less, of profitable lands, plantation measure, and re-trenched by Thomas Brightwell." The lease then demised lands of a different denomination, and proceeded thus:—"situate, lying and being in [a blank] the county of Waterford, in the said Kingdome of Ireland; and were lately in the tenure and occupation of Mr. Richard [a blank], Robert Cook, his assigns or undertenants, and containing in all 296a. 1r. and two feet [a blank], houses, mills, woods, comons, *mountaines, and mountaine* [a blank] lands, libertyes and privileges thereunto belonging, or in anywise [a blank], to hold all and singular the said demised lands and premises *with THE share and proportion of the Towns-mountain, and all and singular,*" &c., "from the first day of May [a blank] before the date hereof, for and during and unto the full end and term of ninety-one years, from thence next ensuing, and fully to be completed and ended."

The plaintiff then gave in evidence a memorandum of agreement dated 12th of January 1793, made between Catherine Griffith, widow of Cristopher Griffith deceased, and John Greene, to whom it recited that she had, for certain considerations, demised (*in his actual possession now being, &c.*), "all that and those parts of towns and lands of Graigemore and Graigebegg, commonly called or known by the names of Graigavurra, Upper Derry and Lower Derry, containing, by a survey made thereof, 485 acres and 2 perches, statute measure, *together with the mountain and common heretofore therewith held and enjoyed* all which said towns, lands and premises, were heretofore, by indenture bearing date the 19th day of September" 1701, "demised to Robert Cook, of, &c., deceased, for the term of ninety-one years; which lease expired on the 1st day of May" 1792, "and were lately in the possession of Edmund Roche, Esq., and the Honorable William

"Brabazon, and their under-tenants, and are situate in the county of Waterford aforesaid; to have and to hold all and singular, &c., unto the said John Greene, his heirs and assigns, *as the same were heretofore demised to the said Robert Cook, and held by the said Edmond Roche and William Brabazon, and their under-tenants*, for and during the natural lives and life of Rodolphus Greene, John Greene, and George Greene, three of the sons of the said John Greene the lessee; and for and during the natural lives and life of the survivors and survivor of them;" with a covenant for perpetual renewal, at an annual rent of £400; with a further covenant, at the request of either party, to execute a lease of the demised premises, with the usual covenants; and it was further "agreed between the said parties that a proper plan of the said lands shall be annexed to every such indenture of lease to be granted as aforesaid."

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Accordingly, there was further given in evidence by the plaintiff a lease dated the 8th of May 1793, executed in pursuance of the above agreement. The parcels were therein further specified as "*meared and bounded as described by the maps hereunto annexed.*"

The plaintiff next gave in evidence an attested copy of the will and codicil of John Greene, the lessee in the lastly-mentioned lease. By that will the testator devised (amongst others) the lands of Upper and Lower Derry, and Graigavurra, subject to the rent payable thereout, and also subject, as is mentioned in the will, to Beverly Hearne and Christopher English, and their heirs and assigns, for ever, upon trust, to the use of the testator's son Rodolphus Greene, and his assigns, for life; with remainder to the use of Rodolphus Greene's first and other sons in tail male; with remainder to the use of the testator's son John Greene, for his life; with remainder to the use of John Greene's (the devisee's) first and other sons in tail male; with remainder to the use of the testator's son George Greene, for his life; with remainder to his first and other sons in tail male; and, in default of such issue, to the use and behoof of" the testator's "three daughters, Grace Greene, Mary Greene, and Ellen Greene, and the several and "respective heirs male of their bodies lawfully issuing, share and

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"tenants; and, in default of such issue, to the use of" the tes-
tator's right heirs for ever.

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The codicil did not interfere with the devise of the said lands.

The plaintiff further gave in evidence a consent-order, whereby it was admitted that John Greene, the lessee and testator, died in the month of January 1801; that his eldest son, Rodolphus Greene, died in the month of January 1807, unmarried and without issue; that the testator's second son, John Greene, died in the month of July 1858, unmarried and without issue; -that the testator's third son, George Greene, died in the month of March 1828, without issue; that the testator's daughter, Mary Greene, died on the 2nd of February 1829, unmarried and without issue; that Grace Maunsell (otherwise Greene), daughter of the testator, died in the month of December 1853, having had one son, who pre-deceased her, and had never been married; and that the plaintiff is the only son of Ellen Poole otherwise Greene, daughter of the testator, and which Ellen Poole died on the 11th of February 1836.

The plaintiff gave also in evidence an attested copy of a commission of lunacy, in the matter of John Greene a lunatic, dated the 7th of May 1828, and an attested copy of the inquisition under that commission, dated 13th of May 1828; whereby it was found that the said John Greene, son of the lessee and testator, had been a lunatic prior to the 26th of September 1811.

The plaintiff then gave in evidence a fee-farm grant dated 13th of April 1850, made between Christopher Darby Griffith, the defendant, of the first part, George Henry Houghton of the second part, and John Greene the lunatic of the third part. By this deed, having recited the lease of 1793, and that all Catherine Griffith's estate and interest in the premises were then vested in C. D. Griffith, and that the interest of John Greene the lessee was then vested in John Greene the lunatic; and having recited (amongst other things) an order made by the Court of Chancery in the lunacy matter, which directed C. D. Griffith to execute a grant, according to the provisions of the Renewable Leasehold Conversion Act, to G. H. Houghton, in trust for the lunatic, C. D. Griffith granted

to G. H. Houghton, and his heirs, "all that and those parts of the towns and lands of Graigemore and Graigebeg, commonly called and known by the names of Graigavurra, Upper Derry, and Lower Derry, containing, by a survey made thereof, 485 acres and 2 perches, statute measure, be the same more or less, together with the mountain and common *therewith held and enjoyed before the time of the making of the said indenture of lease*" (1793). After granting other lands, the said deed proceeded thus:—"All which said several towns, lands and premises are respectively meared and bounded as described by the three several maps to the said original lease annexed, true copies whereof are also hereunto annexed, and are situate in the barony of Decies-without-Drum, and county of Waterford aforesaid;" to have and to hold the said premises, with the appurtenances (except as therein is excepted), unto and to the use of the said G. H. Houghton, his heirs and assigns, for ever, at the yearly fee-farm rent of £369. 4s. 7d. present currency. This deed further contained a declaration, by G. H. Houghton, "that the aforesaid lands and premises hereby granted" had "been so granted to him upon trust, for and on behalf of the said lunatic John Greene, and his heirs, for ever."

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The plaintiff also gave in evidence a conveyance, dated 15th of June 1859, whereby G. H. Houghton assigned to the plaintiff, his heirs and assigns, all the lands comprised in the said fee-farm grant.

The plaintiff produced, as a witness, a surveyor, who proved, from the maps annexed to the various leases, and by a comparison of the lands with the Down Survey, and by an enlargement which he had made of the Down Survey, "58" and "58 m," that a portion of the land marked as "58," and the entire of that marked "58 m," on the Down Survey, correspond with the lands described on the maps annexed to the lease of 1793, and to the fee-farm grant, as Lower Derry, Upper Derry, Graigavurra, and Scart mountain.

After entering other documents, which need not be specified, the plaintiff's Counsel announced that he would not go into any case in anticipation of a case founded on possession.

The Counsel for the principal defendants then required the Lord

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Chief Baron to direct a verdict for the defendants, or to nonsuit the plaintiff, on the ground that no evidence of the possession, or use or enjoyment, of the mountain sought to be recovered, was shown or proved; and that the only title shown in the plaintiff to the mountain in question was to the mountain which was held and enjoyed with the lands of Graigemore and Graigebeg, before the 8th of May 1793; and that no evidence whatever had been given of any possession or enjoyment by those under whom the plaintiff derived, of any part of the mountain sought to be recovered in this ejectment, with the lands of Graigemore or Graigebeg; nor the slightest evidence of any act of ownership or dominion from which such possession or enjoyment could be inferred; and that no possession or enjoyment ever went with any of the documents put in evidence. And further, that the will of John Greene (the lessee) disclosed an outstanding legal estate in the trustees, to whom the estate has, by that will, been demised; and that, as the interest in the lease of 1793 was subsisting when the fee-farm grant was executed, the fee-simple estate thereby created became subject to the uses declared by the said will; and that therefore the legal estate was outstanding.

Counsel for the sub-defendants, on their behalf, and on the same grounds, also called for a nonsuit, and for a direction in favor of his clients. The Lord Chief Baron refused to nonsuit the plaintiff.

Neither party asked the Lord Chief Baron to leave any question to the jury. The plaintiff's Counsel however required his Lordship to direct the jury to find for the plaintiff, for an undivided share of the lands mentioned in the plaint, in the proportion which 256a. 3r. 24p. bear to 880a. and 27p. His Lordship so directed the jury; but reserved to the principal defendants liberty to move the Court above to have the verdict set aside, and either a nonsuit entered, or a verdict entered for the said defendants. Like liberty was reserved to the sub-defendants.

The jury found for the plaintiff, in conformity with his Lordship's directions.

In pursuance of the leave reserved, the Court of Queen's Bench, on the 5th of November 1862, granted to the principal defendants a

conditional order, that the verdict had for the plaintiff be set aside, and a non-suit, or verdict for the defendants therein named, entered; or that a new trial be had, on the ground of misdirection of the learned Lord Chief Baron, and also on the ground of the reception of illegal evidence.

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On the same day, a similar conditional order was granted to the sub-defendants.

Against those conditional orders cause was shown by—

J. E. Walsh, Hemphill, and Tandy.

The phrase "towns-mountaine" means coarse uncultivated land attached to arable land: *Lord Kildare v. Fisher* (a). The Book of Distributions is legal evidence, for the decision in *The Archbishop of Dublin v. Trimleston* (b), which rested on a loose note in 2 *How. Exch. Pr.*, p. 115, where the facts of the case cited are not disclosed, has been overruled, in *Knox v. Mayo* (c), though the Court of Appeal refused to decide that question: *Knox v. Mayo* (d). In *Spaight v. Twiss* (e), the Court of Exchequer decided that the Book of Distributions is legal evidence. It was the duty of the Commissioners under the 17 & 18 *Car.*, 2 (*Ir.*), c. 2, to make such a book; and it was found in the Government Record Office. In order to make the lease of 1793 evidence of possession, it was not necessary to show that some act of ownership accompanied it; but rent has been received under it until now: that is evidence of title against the whole world. The lease having been produced from the proper custody is evidence even against the sub-tenants; it being admitted that part of the lands demised by it is in the plaintiff's possession: *Doe v. Pulman* (f); *Taylor on Evidence*, s. 593. The plaintiff's title only accrued in 1858; so that he was not bound to prove possession within twenty years. The plaintiff proved a title which draws with it a presumption of possession; therefore, the defendant ought to have shown that the plaintiff had *not* had the possession.

(a) 1 Str. 71.

(c) 7 Ir. Chan. Rep. 563.

(e) 13 Ir. Chan. Rep. 516.

(b) 12 Ir. Eq. Rep. 267.

(d) 9 Ir. Chan. Rep. 192.

(f) 3 Q. B. 622.

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Serjeant *Sullivan*, Serjeant *Armstrong*, and *Edward Johnstone*,
for the principal defendants.

The plaintiff has no title, except under the fee-farm grant of 1850, the map on which comprises the entire mountain of Seart, which is not pretended to have been granted by the fee-farm grant. Proof of enjoyment, prior to 1793, of the lands (sought to be recovered) along with the other lands actually demised, was essential, to show what portion of the mountain was granted by the lease of 1793. The plaintiff contends that because the patent gave, with the profitable lands, a certain proportion of unprofitable lands, therefore the same proportion of unprofitable lands passed under the fee-farm grant, though no proof was given that any portion of the mountain had ever been *in fact* enjoyed with the profitable lands. The plaintiff was bound to prove what proportion of the mountain had been, prior to the execution of the lease of 1793, held and enjoyed along with the profitable lands demised thereby. No presumption can be admitted against a man in possession: *Richards v. Richards* (a); *Clarkson v. Woodhouse* (b). In *Doe v. Pulman* (c) the counterpart of the lease was clearly evidence; whereas, in this case, no evidence was given as against persons in possession. A map annexed to a lease cannot be resorted to, if it varies from the antecedent sufficient description of the parcels: *Roe v. Lidwell* (d). —[O'BRIEN, J. But, in that case, there was distinct evidence that the map was wrong; here, there is not any evidence either way].

T. Harris, for the sub-defendants, contended that, as against them at all events there was not any evidence: *Stark. Ev.*, p. 93.

Hemphill, in reply, cited *Gubbins v. Massy* (e); *Rogers v. Allen* (f); *Taylor Ev.*, s. 599.

Cur. ad vult.

On a subsequent day (20th of January) in this Term, the Court

(a) 15 East, 294, note a.

(c) 3 Q. B. 622.

(e) 3 Ir. Law Rep. 239.

(b) 5 T. B. 412, note a.

(d) 11 Ir. Com. Law Rep. 320.

(f) 1 Camp. 309.

desired that the case should be further argued on two points—first, whether the words, “together with the mountain and common heretofore therewith held and enjoyed,” in the lease of 1793, demised only that portion of the mountain of Scart which had previously been *in fact* held and enjoyed, along with the profitable lands, by the lessee in the expired lease; *or* meant that the lessee in the lease of 1793 should take the demised portion of the mountain *in the same manner* as it had been theretofore held and enjoyed—that is to say, that the lessee should take it *as a tenant in common*, the mountain having been appropriated to a number of estates, though no ascertained portion of it had been set apart for this particular estate, along with which it was given, as so much waste land?

Secondly, whether the landlord can, during the continuance of the lease, set up the Statute of Limitations, or any bar of a like nature, such as acquiescence for a length of time, to bar the title of the lessee, who complains that he has never gotten actual possession of a portion of what was demised to him?

J. E. Walsh, for the plaintiff.

Had the present action been brought on the day next after the execution of the lease of 1793, the plaintiff clearly would have been entitled to recover. He still holds, as against the defendants, the very position which he then occupied, for there is not against him any evidence of title, or that he has not been in possession ever since the date of the lease; and the law presumes that he has been so in possession, and that the landlord did not, until the day next before the bringing of the action, commit the trespass complained of. The plaintiff was not bound to give evidence of the particular time at which the landlord turned him out of possession. As against the defendants, the fee-farm grant passed everything which had been demised by the lease of 1793, as appears from its recitals. Nothing less could have passed under the 12 & 13 Vic., c. 105, unless part of the lands had been specially omitted under its 6th section. No such omission can have been, in this instance, made, because the fee-farm

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grant reserves the full rent which had been reserved by the lease of 1793; and the words of grant are identical with those in that lease, save for the omission of the word "*heretofore*," and the substitution of apt words in its stead. The words, "together with the mountain and common *heretofore* therewith held and enjoyed," in the lease of 1793, are, in the fee-farm grant, replaced by these terms—"together with the mountain and common therewith held "and enjoyed *before the time of the making of the said indenture of lease*;" so that especial care was taken not to cut down the grantee's rights under the lease, which described the premises as "meared and bounded as described by the maps hereunto annexed." On the landlord's counterpart of that lease the words "in common" are indorsed; and the whole mountain of Scart is comprised within the ambit of the map. Therefore, the lease of 1793 must have been intended to pass *some* interest in the *entire* mountain, though that interest was to be "held and enjoyed" by the lessee "in common" with other persons.—[O'BRIEN, J. Your argument is that, taking together the lease of 1793 and the annexed map, the lessor's intention was to pass, and that that lease did in fact pass, not *a part* of the mountain, but some undivided share (whatever that share was) of it, which share the lessee was to hold "in common"?]—Yes; and it was not necessary, in order to explain the words "therewith held and enjoyed," that the plaintiff should prove actual possession; for then, in order to show how property had been enjoyed at a remote period, it would be essential to get up and prove the old leases. Supposing however that the word "enjoyed" meant "possessed," still the lease does not say "held and enjoyed *by the tenants*."—[O'BRIEN, J. You contend that the words in the lease are just as capable of being referred to what the *landlord* "held and enjoyed" under the patent?]
—Certainly; because there is nothing to show that the words "held and enjoyed" did not refer to all those waste lands which, under the Act of Settlement, had been always enjoyed and gone along with the arable land granted by the patent. Therefore, if the defendant's ancestor, Catherine Griffith, herself possessed this mountain, some undivided share in it passed by the lease of 1793; and the defendant cannot help

that share passing also under the fee-farm grant. The description in the lease of 1793 refers to the lease of 1701, and shows that the landlord had parted with the possession of the mountain, by letting it. The words "together with the mountain and common heretofore therewith held and enjoyed," mean that the lease of 1701 comprised both the arable land and the same share, whatever that share was, of the mountain; so that the lease of 1793 passed the whole of what had been passed by the lease of 1701.

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There was legal evidence given, whereby the jury could ascertain what proportion of the mountain the plaintiff was entitled to recover. The agreement of the 12th of January 1793, using the words, "all which said towns, lands, &c., were heretofore, by indenture bearing date the 19th day of September 1701, demised to Robert Cooke," &c., shows pointedly that the intention was to pass all that had been granted by the lease of 1701. That lease had granted all Katherine Beard's "share, lot, and portion" of profitable lands, to be held "with *the* share and proportion of the towns-mountain"—that is to say, of the Scart mountain. Both plaintiff and defendant derive under the patent of 1668, which explains what was meant by "*the* share and proportion of the towns-mountain;" for the patent grants the profitable lands "with a proportionable part of the unprofitable lands belonging to the said towne and lands, *according to the number of profitable acres* adjudged to him by the aforesaid Commissioners."—[O'BRIEN, J. You contend that the fee-farm grant unquestionably passed everything that was comprised in the lease of 1793. You construe the words, "together with the mountain and common heretofore therewith held and enjoyed," in that lease, by reference to the annexed map, which does not purport to point out any particular portion of the mountain, but marks and describes the whole of it as "in common." You therefore conclude that the proportion of the mountain, whatever that proportion was, which passed by the lease of 1793, was some undivided share of the mountain, and explain the words, "heretofore therewith held and enjoyed," not only by reference to the lease of 1701, but by a further reference to the patent. You then say that is not any evidence of any holding and enjoyment other than what is thus indicated; and,

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consequently, that, since the words "therewith held and enjoyed" are capable of meaning "held and enjoyed *by the landlord*," it does not follow, as a consequence from the lease of 1793, that the intention necessarily to be deduced from that language was to convey only what had been "held and enjoyed *by the former tenants*."—Just so; and the fee-farm grant, by which the defendant passed out of himself everything that he had in it, estops him from saying that the mountain did not pass: *Co. Lit.*, s. 667.

Serjeant *Sullivan*, for the principal defendants.

As between landlord and tenant, the doctrine of estoppel cannot be applied until that which passed has been ascertained. Though land cannot be passed as appurtenant to land, it may be passed by apt words denoting continuous enjoyment of land connected with the principal subject-matter of the grant. "So, by a devise of land "in N, *with all lands belonging*, two acres, four miles distant, continually enjoyed with it, pass:" *Com. Dig.*, tit. *Grant*, let. E, 9. The phrase "*cum terris pertinentiis*," in *Comyn's Digest*, is identical with "therewith held and enjoyed;" and, so far as appears on the face of these deeds, this mountain did not pass, save as being connected with the enjoyment of the profitable lands of Graigebegg and Graigemore. The plaintiff has failed, because he has not shown that the mountain has been held and enjoyed with the lands of Graigebegg and Graigemore; and there is not any evidence that one acre of the mountain itself has ever been granted.

Unless the plaintiff has got the mountain under the fee-farm grant, he cannot recover, for he has no other title, all the lives named in the lease of 1793 having died. Now the recitals in the fee-farm grant of 1850 do not mention the mountain at all; and the words of grant passed only such parts of the mountain as had been held and enjoyed, before the lease of 1793 was made, with the lands of Graigebegg and Graigemore. The fee-farm grant is not one of *all* the lands demised by the lease of 1793. If the lease of 1793 and 1701 had never existed, and the grantee went into possession under the fee-farm grant, and brought an action

of ejectment to recover the whole mountain, he would have no title unless he gave evidence of its enjoyment with the lands of Graigebegg and Graigemore. The words of grant in the fee-farm grant are, so far as regards the mountain, almost indetical with those in the lease of 1793, which mean "the mountain and common, whatever they were, which had, before the date of that lease, been, by the occupiers of the lands of Graigemore and Graigebegg, and by right of their occupation of those denominations, held and enjoyed with them." The plaintiff was bound to prove that the mountain and common, which he seeks to recover, had been so held and enjoyed. The words in the lease of 1701 are different—"with the share and proportion of the Towns-mountain." The Court cannot presume that that lease meant to pass the same land which had been granted by the patent, which is not mentioned in the lease. In that lease the mountain is, for the first time, mentioned in the *habendum*. But the *habendum* cannot enlarge the premises: *Com. Dig.*, tit. *Fait*, let. E, 10. Also, "If the thing granted be only in the *habendum*, and not in the premises of the deed, the deed will not pass it:" *Touchstone*, p. 76. The same proposition is laid down, even more strongly, in *Vin. Abr.*, tit. *Grant*, let. I, a, *hab*. Therefore the lease of 1701 did not grant or demise the share of the mountain which the plaintiff says had been granted to the lessor by the patent.

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T. Harris, for the sub-defendants, contended, that their possession not having been displaced by any evidence against them, that was a sufficient answer to the plaintiff's case against them.

J. E. Walsh, in reply.

There is no authority to support the defendant's proposition, that in an action of ejectment the plaintiff must prove both title and possession. The two classes of defendants are in one and the same position, because the payment of rent under the lease of 1793 is sufficient evidence against the whole world: *Doe v. Pulman* (a); *Tayl. Ev.*, par. 593; *Rogers v. Allen* (b). These

(a) 3 Q. B. 622.

(b) 1 Camp. 309.

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cases establish that the mere production, from the proper custody, of an ancient deed, along with proof of an act done in connection with it, is sufficient evidence against the whole world. The plaintiff here has proved payment of rent under the lease of 1793; that is an act done in connection with it. Although the *habendum* of a deed cannot enlarge the premises, it "may abridge or alter the generality of the premises:" *Com. Dig.*, tit. *Fait*, let. E, 9: and the *habendum* in the lease of 1701 limits the generality of the premises to "*the share and proportion of the towns-mountain.*" With respect to the words "held and enjoyed therewith," which are said to be equivalent to "*cum terris pertinentiis*," proof of enjoyment would be quite sufficient: *Com. Dig.*, tit. *Fait*, let. E, 7:—"If he grants the manor of B with all lands reputed "parcel thereof, and occupied therewith, except the manor of C, "if Whiteacre be *reputed* parcel of B, *and occupied* with it, "though in truth it be a part of the manor of C, it shall not "be excepted."

Cur. ad. vult.

HAYES, J.

Jan. 31.

The Court being divided in its opinion as to the rights of certain of the defendants, though unanimous as to the question raised by Mr. C. D. Griffith, I shall, with the permission of my LORD CHIEF JUSTICE, proceed now to give my opinion on both parts of the case.

As it has been fully admitted that the case, so far as Mr. Griffith is concerned, is wholly unaffected by any Statute of Limitations, it becomes necessary only to regard it as affected by the language and true construction of the documents that have been given in evidence on the part of the plaintiff. He rests his case primarily and mainly on the fee-farm grant of 1850. That instrument, which is executed by Mr. Griffith, recites the execution in 1793 of a lease for lives renewable for ever of certain lands and premises, by Mrs. Catherine Griffith to one John Greene. It also recites that Catherine Griffith's and John Greene's estates, respectively, had become vested in the defendant Griffith and in one John Greene a lunatic; and after

reciting certain orders of the Court of Chancery, the deed witnesses that, in pursuance of the Leasehold Conversion Act and of the said orders, the said C. D. Griffith did thereby grant the lands of Graigemore and Graigebeg, commonly called and known as Graig-navurra, Upper Derry and Lower Derry, containing 485a. Or. 2p., statute measure, "together with the mountain and common there-with held and enjoyed before the time of the making of the said "recited indenture of lease," "all which said lands and "premises are meared, bounded and described by a map to that "lease annexed, a true copy of which is also annexed hereto, to "hold to Henry George Haughton (trustee for the lunatic), his "heirs and assigns, for ever."

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Thus we perceive that the grantor, by the language which he has used, refers us for illustration of his meaning, as to the extent of his grant, to the lease of 1793 with the map annexed, and to the state of things as they existed at that day. But as it would be next to impossible to get living testimony as to what particular mountain and common had been held and enjoyed with Graigemore and Graigebeg, prior to the making of that lease, it becomes doubly necessary to look to the other source to which he has referred us; bearing in mind that the object of both parties, as evidenced by the recitals of the grant, was to give and obtain a conveyance "of the lands comprised in the said lease of 1793."

Looking at that instrument we find that the parcels thereby conveyed were all that and those part of the towns and lands of Graigemore, &c., containing 485a. Or. 2p., statute measure, "together with the mountain and common heretofore therewith held and "enjoyed," "all which said towns, lands and premises were "heretofore, by indenture bearing date the 19th of September 1701, "demised to Robert Cooke for 91 years, and which lease expired "on the 1st of May 1792." The map, on being looked to, comprises the whole mountain of Scart, which is of a somewhat triangular shape, lying to the north-west of Graigemore and Graigebeg, or as they are there called Graigavurra, Lower Derry and Upper Derry, and containing 1340a. 1r. 20p., statute measure: thus showing pretty plainly that some share or interest in the whole

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of that mountain, rather than some definite and divided part of the mountain, was intended to be granted; and this is rendered more certain when we observe that under the name "Scart mountain" are written on the margin the words "in common."

Thus, by the language of the lease of 1793, imported into and incorporated with the grant of 1850, the defendant Griffith himself forces us back still further up the stream of time; and at his instance we are to examine the deed of 1701 to see what was demised thereby, and thus to come at what was afterwards granted in 1850. That deed of 1701 was made by Catherine Beard, John Beard and Michael Wicks, to Robert Cook, and by it they demise to him "all that the share, lot and proportion of Catherine Beard, "John Beard and Michael Wicks in Graigemore and Graigebeg, "containing 256a. 3r. 24p., profitable land, plantation measure, "and retrenched by Thomas Brightwell, with all mountains, &c., "held therewith, to have and to hold the said demised lands "and premises, with the share and proportion of the Towne- "mountain, for 91 years," &c. Here is another earmark which we find has been virtually affixed by the defendant to the premises granted in 1850. We are told that the profitable land was retrenched by Thomas Brightwell; that with it mountain land was held, and that the lessor thereby purported to convey "the share and proportion of the Towne-mountain." By this, I apprehend, must be understood the whole share and proportion which Beard the lessor was competent to give in that mountain therein called "the Towne-mountain."

The problem now to be solved is:—"Is this Towne-mountain "the same as Scart? and if so, what was the share and proportion "which the lessor had to give in the year 1701?" No exactly cotemporary document is forthcoming; but still the matter is not wholly left in darkness, as we are at full liberty to look at extrinsic facts and circumstances existing at, or as near as possible to, the time of the execution of this lease, which have been proved at the trial, and are calculated to throw light upon the language used in it.

By a patent of King Charles the Second, dated the 20th of

July 1669, his Majesty granted to Robert Beard, Robert Robins, John Stephenson, and Elizabeth Winston and William Winston, her son, the lands thereafter mentioned, that is (*inter alia*) to Robert Beard in Graigemore and Graigebeegg, 256a. 3r. 24p., profitable land, plantation measure, retrenched by Thomas Brightwell, with a proportional part of the *unprofitable lands belonging to the said town* and lands, according to the number of profitable acres adjudged to him by the certificate of the Commissioners for executing the Acts of Settlement and Explanation. The patent then gives other parts of the same townlands to the three other parties, viz., to Robert Robins, 422a. 2r. 5p., to John Stephenson, 74a. 0r. 11p., and to Elizabeth and William Winston, 126a. 2r. 27p., with a proportional part of the unprofitable lands, &c., as before. All these profitable lands so granted amount to 880a. 0r. 27p., plantation measure.

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Looking to the map of the premises in the Down Survey, which was made in the year 1653, we find the lands of Graigemore and Graigebeegg delineated and marked as No. 58; and also a portion of land, of somewhat triangular shape, to the north-west of that, numbered 58m, and marked as "coarse heath mountain." This corresponds, almost precisely in figure, acreage and situation, with what is laid down in the map of 1793 as the Scart mountain. Again, in the Book of Distributions, which we know contains abstracts from the Down Survey, we find that the profitable lands of Graigemore and Graigebeegg (58), represented to contain 896a. 3r., is apportioned as to all these persons (except John Stephenson), in precisely the same amounts of acreage as already mentioned; and that the unprofitable mountain land (58m) contains 1084a. 2r., Irish plantation measure.

These maps and documents seem to me then to afford pretty clear evidence for a jury to infer that the mountain land to the north-west of Graigemore and Graigebeegg, which is marked in the Down Survey as 58m, and by that reference is stated in the Book of Distributions to have been disposed of to Robert Beard and the other co-grantees, is the very same territory which is spoken of in the patent as "the unprofitable land" belonging to

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But now I come to the second branch of the case, which concerns Mr. *Harris's* clients, and am henceforth to be understood as speaking my own opinion only. Mr. *Harris's* clients have severally taken defence for the portions of land in their possession respectively. These lands are set out by metes and bounds, which, in my judgment, essentially distinguishes their case from that of Mr. Griffith. Moreover, that gentleman, as I have said, has bound himself by the fee-farm grant of 1850, and bound himself to abide by all the consequences which the language of that deed has reasonably and properly induced upon him. Mr. *Harris's* clients are in nowise bound by the language of that instrument, nor are they at all concerned in it; but are dealt with merely as persons in possession of distinct portions of land. They severally took defence, and went down to trial; and the question with respect to them is, who is best entitled to the possession of these portions of land? Now, since the passing of the 3 & 4 W. 4, c. 27, I take it to be the duty of a plaintiff in ejectment to show not merely a proper title, such as the plaintiff might have had, and as I believe undoubtedly had, in 1793, with respect to these lands; but is bound to show a title unbarred by the Statute of Limitations: in other words, the plaintiff must show that his right of entry accrued to him within twenty years next before the action of ejectment was brought. In my opinion that is consistent, and harmonises with the doctrine laid down in the case of *Nepean v. Doe d. Knight (a)*. That case was fully considered by the Court of Exchequer Chamber;

(a) 2 Sm. L. Cas. 433; S. C., 2 Mee. & W. 910.

and I think it rules the present case. Since the passing of the Statute of Limitations, barring not only the remedy but the right, it is the duty of a plaintiff in ejectment to show not only a right, such as may exist on paper or parchment, but to show a title accompanied by actual possession within twenty years next before action brought. That not having been done, the plaintiff has failed to establish a better title to the possession than that which Mr. *Harris's* clients have by reason of their possession.

In my opinion therefore the Court ought, pursuant to the leave reserved, to enter a verdict for Mr. *Harris's* clients, as to the portions of land for which they have respectively taken defence.

O'BRIEN, J.

I am also of opinion that, as to the defendant Mr. Griffith, the conditional order obtained by him for setting aside the verdict should be discharged.

The Counsel for Mr. Griffith and the other defendants have declined to argue the objections to the admissibility in evidence of the extract from the Book of Distributions, and other documents read and objected to at the trial, and submit to those objections being overruled, reserving liberty to them however to rely on them before the Court of Error. So far therefore as Mr. Griffith is concerned, the only question is, whether the premises for which plaintiff has obtained a verdict formed part of the premises expressed to be demised by the lease of 1793, which was executed by Mrs. Catherine Griffith (the mother of the defendant Griffith) to John Greene, under whose will the plaintiff claims. With regard to Mr. Griffith, no question arises upon the effect of the Statute of Limitations, which was not indeed relied on by his Counsel, either at the trial or during the present argument. Independent of the objection that, during the pendency of that lease, Mr. Griffith, claiming under the lessor, should not be allowed to insist, as against his tenant, upon retaining, by reason of the statute, the possession of part of what had been demised by the lease, there is in this case the further fact that, by the fee-farm grant of 1850, executed within twelve years before this ejectment was

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brought, Mr. Griffith granted to the plaintiff, in express terms, all that had been demised by the lease of 1793. This puts the Statute of Limitations, as to Mr. Griffith, out of the case. With respect to the question whether the premises in dispute were demised by that lease, it is singular that in an ejectment involving the right to so considerable a quantity of land, neither plaintiff nor defendant gave at the trial any direct evidence of actual possession; but in my opinion there was, upon the documents proved at the trial, sufficient evidence to warrant the jury in coming to the conclusion that the undivided portion of the mountain, for which they have given their verdict, was part of the premises expressed to be demised by that lease. Mrs. Griffith by that lease demised to J. Greene, for three lives renewable for ever, "certain parts of Graigemore and Graigebegg, containing by "survey 485a. 2p., statute measure, more or less, *together with the "mountain and common heretofore therewith held and enjoyed."* (And also certain other lands of Tullaghcoolemore, Tullaghcoolebeg, and Lisseenoona); "All which said towns, lands and premises, "were heretofore, by indenture of the 19th of September 1701, "demised to Robert Cooke deceased, for ninety-one years, which "lease expired on the 1st of May 1792, and were lately in "the possession of Edmond Roche, Esq., and the Hon. Walter "Brabazon, and their undertenants; *all which premises are "meared and bounded as described by the map hereunto annexed."* It was argued by defendant's Counsel that this lease, according to the ordinary meaning of its terms, purported to demise some definite and distinct portion of the mountain which had been theretofore held and enjoyed together with the parts of Graigemore and Graigebegg thereby demised; that the words "*held and enjoyed*" referred to what was actually "*occupied*" by the tenants of Graigemore and Graigebegg at and previous to the time of the execution of the lease; and that, accordingly, it was incumbent on the plaintiff, who confessedly could only claim a portion of the mountain, to show, by distinct evidence of actual occupation, at or previous to that period, what such portion was, and what particular parts of the mountain had been previously held and

enjoyed by the tenants of said parts of Graigemore and Graigebegg. It appears however, on reference to the map annexed to the landlord's part of that lease of 1793, and which map is, as above mentioned, referred to in the lease itself as describing the premises thereby demised, that the mountain in question is described in that map as being "*in common*." These words "*in common*" appeared to have been effaced by time or accident from the map annexed to the tenant's part of that lease; but there is no doubt they were originally on it. In the map itself the mountain is represented as one continuous undivided tract of land, without any intervening bounds or fences: and, considering the description in the lease in connection with the map to which it refers, I think the inference is, that what was purported to be demised by the lease was not a distinct and divided portion of the mountain, which might have been designated by metes or bounds, but only some undivided share thereof, to be ascertained by reference to the previous holding and enjoyment. The jury have found the plaintiff's undivided share of the entire mountain to be in the proportion which 256a. 3r. 24p. bear to 880a. and 27p.; and a reference to the documents produced at the trial will show how that proportion was arrived at.

The patent of 1668 granted to Robert Beard 256a. 3r. 24p., plantation measure, profitable land, in Graigebegg and Graigemore, *with a proportionable part of the unprofitable lands belonging to said towns and lands, according to the number of profitable acres adjudged to him by the Commissioners' certificate therein mentioned*; and also granted him parts of the lands of Lisseenoona, Tullaghcoolemore, and Tullaghcoolebeg. It also granted to R. Robins, J. Stephenson, and Elizabeth Winston, three other several portions of said profitable lands of Graigemore and Graigebegg, together with "*proportionable parts of the unprofitable lands belonging thereto*." The contents of these three latter portions of profitable lands in Graigemore and Graigebegg are also stated in the patent, and, being added to the 256a. 3r. 24p., plantation measure, granted to Beard, make together 880a. and 27p., plantation measure, as the contents of the entire of the profitable lands

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in Graigemore and Graigebegg, which were granted by said patent to Beard and the other patentees; so that the undivided share of the unprofitable lands which Beard took under the patent was in the proportion of 256a. 3r. 24p. to 880a. and 27p., the same proportion as was found by the jury to represent plaintiff's share of the mountain in dispute. It appears by the Down Survey, and extract from the Book of Distributions, that the unprofitable lands so granted by the patent in common with the lands of Graigemore and Graigebegg, are represented on the Down Survey by the figure marked "58m, *coarse heath mountain*," containing 1084½ acres. It also appears, by the evidence of the surveyor at the trial, and the comparison of the enlarged tracing of the Down Survey, prepared by him with the maps on the lease of 1793, and fee-farm grant of 1850, that (making allowance for some portions of the unprofitable land which had been reclaimed, and are now arable land) the Scart mountain now in dispute is identical with said unprofitable lands granted by the patent, and marked on the Down Survey "58 m," &c. It is also clear, from the maps and other documents, and is not in fact disputed, that the profitable lands in Graigemore and Graigebegg, granted to Beard by the patent, as containing 256a. 3r. 24p. plantation measure (making about 416 acres statute measure), are the lands, or portions of the lands, of Graigemore and Graigebegg demised by the lease of 1793, as containing 485 acres, statute measure; and the finding of the jury that plaintiff was entitled to a share of the mountain, of the same proportion as that granted to Beard by the patent, involves the supposition that the lease of 1793 demised not only the same portions of the profitable lands of Graigemore and Graigebegg, as were granted to Beard by the patent, but also demised the same share of the mountain as the patent granted to him in connection with said profitable lands; and that it was Beard's original share of the mountain which was designated in that lease as the mountain and common theretofore held and enjoyed with the lands of Graigemore and Graigebegg thereby demised.

It appears by the Chief Baron's report that he directed the

jury to find a verdict for plaintiff, and did not in fact leave any question to them; but that this was done by arrangement between the parties; the defendants not requiring any question to be left to the jury, but having liberty reserved to move this Court to have a verdict entered for them. The case is therefore to be considered as if the evidence had been actually submitted to the jury, and they had found thereon for plaintiff; and the question for our decision is, whether there was sufficient evidence to warrant the jury in finding that it was Beard's original share of the mountain which was demised by the lease of 1793. I have already observed that no direct evidence was given as to the *actual occupation* of the mountain in or previous to 1793; but that lease states that the towns, lands and premises, thereby demised, had been demised by a previous lease of the 19th of September 1701, for the term of ninety-one years (which expired on 1st of May 1792), and had been then lately in the possession of E. Roche, William Brabazon, and their under-tenants. It appeared, from a copy of that lease of 1701, which was read for plaintiff at the trial (having been furnished under an order of the Court), that Katherine Beard, John Beard, and Michael Wicks, thereby demised to said Robert Cook the same profitable lands in Graigemore and Graigebeegg as had been granted to said Robert Beard by the patent; also said lands of Liaseenoona, Tullaghcoolemore and Tullaghcoolebeg, together with the houses, mills, woods, "*common, mountains and mountain,*" &c., thereunto belonging—to hold all said demised lands and premises, with "*the share and proportion of the towns-mountain,*" and all and singular the "*commons, &c., thereunto belonging,*" for the term of ninety-one years from 1st of May 1701, at the rent therein mentioned. This lease of 1701 does not refer to the patent, or to any map; but the recital in the subsequent lease of 1793 (by which the defendant Griffith is bound), that *all* the lands and premises thereby demised had been also described by said previous lease of 1701, shows that what were demised in that previous lease as "*towns-mountain*" were the same premises as the mountain marked in the map on the lease of 1793 as "*in common,*" and therefore, having regard to the surveyor's evidence of the comparison of that map with

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It is the mountain now in dispute which is described in the patent as "unprofitable lands," in the lease of 1701 as "*towns-mountain*," and in the lease of 1793, and map thereon, as mountain "in common." If then Beard's original share thereof was "the share and proportion" mentioned in the lease of 1701, and if during the term of the holding under that lease (which did not expire until May 1792) there appeared no act by partition or otherwise to affect that share, or to vary the proportions in which the several proprietors of the profitable lands of Graigemore and Graigebegg would, under the patent, have been entitled to that mountain, would not the jury be warranted in finding that original share of Beard's to be the share referred to in the lease of May 1793, as having been theretofore held and enjoyed with Beard's lands of Graigemore and Graigebegg?

Plaintiff's Counsel have objected that the lease of 1701 did not operate to pass "*the share and proportion of the towns-mountain*," because those words occur only in the "*habendum*" of the lease and not in the "*premises*." In answer to this objection, defendants' Counsel contend that the words "mountaines and mountaine," which do occur in the "premises" of that lease, were sufficient to have passed the mountain; and that the words in the

"*habendum*" might be relied on as showing what was intended to have been granted by the words used in the "premises." The case of *Lord Kildare v. Fisher* (a), to which we have been referred, shows that the word "*mountain*" in this lease may well be construed as describing uncultivated and unprofitable lands. Considering also that the lease of 1701 is relied on to show what was referred to by the statement respecting it in the subsequent lease of 1793, and what share of the mountain had been dealt with in connection with the lands of Graigemore and Graigebegg, I do not think that this objection affects the question before us.

Upon the case as to Mr. Griffith, I am accordingly of opinion that the evidence furnished by the several foregoing documents, not being contradicted or qualified by any evidence on his part, not only warranted the finding of the jury, but that any other finding would have been inconsistent with that evidence. It is not disputed that the portions of Graigemore and Graigebegg, demised by the lease of 1793, include the portions of those lands granted to Beard by the patent; or that the mountain mentioned in that lease, and described in the map thereon as "in common," is identical with the unprofitable lands, which by that same patent were granted to Beard and the other grantees of Graigemore and Graigebegg in various undivided shares, proportionable to the contents of their respective portions of Graigemore and Graigebegg. It is clear from that lease and map, that the part of the mountain thereby demised was some *undivided share* thereof; and the lease describes that share as what had been theretofore "*held and enjoyed*" with said portions of Graigemore and Graigebegg thereby demised. Even if that lease was of recent date, it would be difficult to show, by mere evidence of actual occupation or acts of ownership previous thereto, what was the amount of that undivided share. In the absence of any such evidence, plaintiff relies upon the documents as showing that such undivided share was the share which he now claims; and he contends that the words "heretofore therewith held and enjoyed," used in the lease of 1793 to describe the

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(a) 1 Str. 71.

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part of the mountain thereby demised, denote the undivided share which was originally derived and held by Beard under the patent in connection with his said portions of Graigemore and Graigebegg, demised by said lease, and which was dealt with in the lease of 1701, by the then proprietors of the same portions of Graigemore and Graigebegg, as being in connection therewith. The subsequent lease of 1793 states that *all* the premises thereby demised had been also demised by said previous lease of 1701; and during the entire period which elapsed from the date of that previous lease (and indeed from the patent), until the date of the subsequent lease, nothing appears to have been done whereby the share of the mountain held in connection with plaintiff's lands of Graigemore and Graigebegg, was varied or reduced from what had been originally granted to Beard by the patent. It appears therefore that while Beard's original share answers the description in the lease of 1793, there is no ground for suggesting any other share that would do so.

With respect to the defendants Michael O'Brien and others, for whom Mr. *Harris* is Counsel, he contends that their case is distinguishable from that of Mr. Griffith. That as they are not in privity with and do not claim under Mr. Griffith or any of his ancestors, they are strangers to the lease of 1793, and that accordingly these defendants are not *bound* by the statements in it; and that the expired lease of 1701 (unaccompanied by any evidence of actual possession under it) is no evidence against them that the premises thereby demised were held or enjoyed thereunder, or were the estate of the lessors therein. He further contends that these defendants are entitled to rely on the Statute of Limitations as a bar to plaintiff's claim against them. In answer to this objection as to the effect of the lease of 1701 as evidence against these defendants, Mr. *Walsh* has referred to the case of *Doe d. Egremont v. Pulman* (a), which appears to be an authority in point. It is not however necessary for me to consider how far the result of the evidence proves against those defendants as well as against Mr. Griffith, that Mr. Griffith was, at

(a) 3 Q. B. 622.

the date of the lease of 1793, entitled to the share of the mountain claimed by plaintiff, and that such share was thereby demised, because I am of opinion that as to those defendants the Statute of Limitations is a good defence to the action.

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Supposing the result of the evidence to be as above stated, it would follow that, upon the execution of the lease of 1793, John Greene the lessee therein became entitled to the possession of the premises thereby demised, including the undivided share of the mountain claimed by plaintiff. It appears by the evidence and admissions at the trial that the rent under that lease, and the subsequent fee-farm grant of 1850, has been paid to the present time; and that there has been also possession thereunder of said portions of Graigemore and Graigebeigg comprised therein; but there is no evidence whatever to show that either John Greene the lessee, or any of his devisees or other persons claiming under him, have *ever* been, either by themselves or their tenants, or otherwise, in possession or receipt of the rents of said share, or of any part of the mountain, or have ever exercised any acts of ownership over same. As the share of the mountain demised by that lease was only an undivided share, and the mountain was then in common, it might be impossible to give evidence of actual possession or enjoyment co-extensive with the share to which the lessee was entitled under the lease; and accordingly the proof of his possession of, or acts of ownership over, any part of the mountain, may be sufficient evidence of his possession of the entire of his share, so as to preserve his right thereto from the bar of the Statute of Limitations; and proof of such partial possession or ownership at a recent period would be ground of presuming that there had been the same previously from the date of the lease up to that period. But there is no such evidence in this case, either as to the several parts of the mountain for which those defendants have respectively taken defence, or as to any other parts of it; nor does it even appear that there was any such possession or exercise of ownership by any of the proprietors of the other portions of Graigemore and Graigebeigg, granted by the patent, who would appear to have been entitled to the other undivided

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shares of the mountain. There is in fact a total absence of evidence as to how any part of the mountain has been possessed and occupied from the date of the lease until the bringing of this ejectment, except what is to be inferred from the ejectment and defences. On referring to the defences taken by Mr. *Harris's* clients, it appears that they were taken for several separate and defined portions of the mountain, stated to be in their possession respectively, and the acreable contents of which are stated in the defences. There is, as I have already stated, no evidence to show that those defendants claim under Mr. Griffith or any of his ancestors, or to show when, or from whom, or how, they first acquired possession of their respective portions; and for anything that appears to the contrary they, or those from whom they derive, may have acquired such possession during the life of John Greene the original lessee. It has been stated during the argument that they came in under Mr. Griffith; but we cannot act upon the supposition of a fact of which there is no evidence whatever, and which if it existed could have been so easily proved. Considering the position and extent of the mountain, it is impossible to suppose that abundant evidence might not have been given to show how the mountain had been occupied and possessed, at least during a considerable period of time previous to the ejectment; and it is certainly not satisfactory to have to decide the question of the Statute of Limitations with such defective information as to the state of previous occupation. Plaintiff's Counsel have however decided to rest his case upon the evidence as it stands, and have declined to adopt the suggestion I threw out during the argument, of a new trial being directed, with a view of supplying this deficiency.

How then, upon the evidence, does the case as against Mr. *Harris's* clients stand with respect to the Statute of Limitations (3 & 4 W. 4, c. 27)? The 2nd section of that Act provides that no person shall make an entry or bring an action to recover land, but within twenty years next after the right of such entry or action shall have first accrued to him, or to some person through whom he claims. The 3rd section points out the several times at which, in the

various cases therein provided for, such right of entry or action shall be deemed to have first accrued. In the case now before us, the plaintiff claims the share of the mountain in question in respect of an estate in possession granted to his testator John Greene by the lease of 1793; and there is, as I have already stated, no evidence to show that John Greene, or anyone claiming under him, was ever in possession or receipt of the rents and profits of that share, or of any part of the mountain. If then, as stated in the passage already cited from *Cole on Ejectment* (page 6), a plaintiff in ejectment "must always prove a legal title to possession *not barred by the statute*," what is the ground upon which, in the present case, plaintiff seeks to get rid of this *prima facie* statutable bar? The ground principally relied on by plaintiff's Counsel in the argument was, that John Greene the lessee, who died in January 1801, had by his will demised the lands and premises comprised in the lease of 1793 to the use of his three sons successively, as tenants for life; with remainder to their several sons successively in tail male; with remainder to the use of testator's three daughters, as tenants in common in tail; that testator's said three sons all died without issue: that Rodolphus Greene, the eldest son, died in 1807; George, the third son, died in 1828; that John Greene jun., the second son (who had been found a lunatic from some time previous to 26th of September 1811), died in 1858; that testator's three daughters had previously died, two of them having died without issue; that plaintiff was the only child of the third daughter; and, accordingly, as remainderman in tail under said will, became entitled, on the death of said John Greene jun., to the possession of said lands. Upon referring to the will, I find that it does not mention or devise the mountain in dispute as part of the premises comprised in the lease of 1793, but mentions only the other lands comprised in it. Even if his share of the mountain had not passed by that specific devise in strict settlement, it would have passed to Rodolphus Greene, either under the residuary devise in the will, or as heir-at-law, and would now belong to plaintiff as his heir-at-law. This circumstance appears material only so far as it may affect the operation of the statute; and the

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argument before us has proceeded on the supposition that the specific devise was sufficient to pass all the premises in the lease, including the share of the mountain. Assuming that to be the case, plaintiff's Counsel contend that, independent of the lunacy of said John Greene jun., the existence of successive estates for life under testator's will, from his death in 1801 until the death of John Greene jun. in 1858 (when plaintiff first became entitled to an estate in possession), prevented the operation of the statute during that period. But this argument involves the supposition that the time fixed by the statute had not commenced to run before testator's death, which would be the case if there was either any direct evidence of testator's being in possession during his life and up to the time of his death, or any evidence of subsequent possession by those claiming under his will, from which such previous possession by testator himself might reasonably be inferred. In the absence of any such evidence of possession at any time, either by testator or anyone claiming under him, the conclusion in my opinion is, that the period fixed as the statutable bar had commenced to run before testator's death, and was not therefore stopped by reason of the creation of successive life estates by his will.

The pendency of the lease of 1793, and the continued possession under it of the other demised premises, and payment of the entire rent thereby reserved, have also been relied on by plaintiff's Counsel; but these facts do not in my opinion answer the defence of the statute. If the lessee under any lease enters into possession of all the demised premises, except one portion, and pays the full rent reserved by the lease, but never "in any way enters into possession" of that particular portion, or into the receipt of the profits thereof, and then at the end of sixty years (the lease being still pending) brings his ejectment for the recovery of that particular portion, against a person then in possession thereof, but who is not shown to have come in under, or to be in privity with, the lessor or lessee, I do not see how the pendency of the lease or the payment of rent, or possession of the other premises under it, could be relied on as preventing the operation of the statute. In my

opinion the plaintiff in the present case cannot, as against Mr. *Harri's* clients, be in a better position than Mr. Griffith would have been if that lease of 1793 had not been executed, and if he had now brought an ejectment against those defendants for his undivided share of their portions of the mountain, but failed to give any evidence whatever to show that he or his mother, or anyone claiming under them, had ever been in possession since 1793 of any portion of the mountain.

It has been further urged, on behalf of the plaintiff, that, before these defendants can rely on the Statute of Limitations, they should show that they themselves, or those whom they succeeded, have been in possession for more than twenty years; so as to have acquired a title under the statute; that otherwise they are to be considered as mere trespassers, and not entitled to rely on the statute, against plaintiff, who has proved a good title, if not affected by the statute. I do not however concur in this argument. It is I think incumbent on the plaintiff to show "a good legal title to the possession, not barred by the statute." The ejectment and defences in this case show those defendants to have been for some time in possession of their portions of the mountain; and there is nothing in the evidence to limit the previous duration of that possession. If plaintiff intended to rely on the shortness of the period since defendants got possession, as preventing the operation of the statute (though he had given no proof of possession at any time within the last sixty years by himself, or those under whom he claimed), it was I think necessary for him to show within what period defendants' possession was acquired. It is true that, in the case of *M'Donnell v. M'Kinty* (a)—not cited in the argument, and which was an ejectment for premises that had been excepted and reserved out of an old lease of 1738, and was brought by the assignees of the lessor against the assignees of the lessee,—it was laid down by Blackburne, C. J., in delivering the judgment of the Court, that by the word "discontinuance" in the 3rd section of the statute, was meant an abandonment of possession by one person, followed by the actual possession of another; and that, if

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(a) 10 Ir. Law Rep. 526.

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no person succeeded to the possession vacated or abandoned, there could be no one in whose favor or for whose protection the Act could operate. Now, admitting the principle of that case to be applicable to the title and possession of land, it is to be observed that evidence was given in it by the *plaintiff* showing that it was *only lately* that the premises had been used by defendants, or those claiming under them. In this case however there is no similar evidence as to defendants' possession being but recently acquired; and there is this further circumstance (already referred to), that there is no evidence whatever of J. Greene, or those claiming under him, having ever been in possession of any part of the mountain since the lease under which the plaintiff claims.

The principle laid down in *M'Donnell v. M'Kinty* was recognised by the Court of Exchequer in England, in a subsequent case of *Smith v. Lloyd (a)*, which arose upon a grant of lands in fee in 1725, excepting and reserving the mines and minerals to the grantor and his heirs,* and was an action of trespass, brought by the assignees of the grantee of the lands against the assignees of the grantor, for digging and raising the minerals. The pleadings were voluminous; the plaintiff relied on the Statute of Limitations as barring defendant's right to the mines, and on the fact that, since the death of the grantor, no one claiming under him had been in actual possession of the mines. Defendant relied on the fact that neither the grantor, nor those claiming under him, had ever been dispossessed, or had discontinued possession. The question arose on demurrer to defendant's *rebutter*, in which he states that neither the grantee of the lands, nor any one claiming under him, nor any other person, had ever "*entered on or worked the minerals;*" and the Court of Exchequer, though recognising the principle of *M'Donnell v. M'Kinty*, held the *rebutter* bad; considering that it was incumbent on the defendant, who sought to get rid of the bar of the statute on the ground of there having been no actual possession of the mines by other parties, to negative in his pleading all the modes by which such possession might be acquired, and that he had not done so by his *rebutter*. I think therefore that plaintiff

(a) 9 Exch. 562.

in this case cannot rely upon the principle laid down in *M'Donnell* H. T. 1863.
M'Kinty, as he has given no evidence as to the period when defend- *Queen's Bench*
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Upon the foregoing grounds I have come to the conclusion that, **GRIFFITH.**
 as to Mr. *Harris's* clients, plaintiff's claim is barred by the statute,
 and that they are entitled to a verdict for them as to the several
 portions of the mountain for which they have taken defence. The
 question however is not free from doubt; and I am therefore glad
 that the case is to be brought by appeal before the Court of Error.
 The liberty to appeal should apply to our ruling upon all the
 objections, taken at the trial, to evidence, or otherwise, whether
 argued before us or not.

In case the Court of Error should confirm our ruling upon both
 orders, it will be necessary for plaintiff, before making up his
 judgment, to have the *postea* amended, by excluding from the
 verdict found for plaintiff those portions of the mountain for which
 Mr. *Harris's* clients have taken defence, and giving him an undi-
 vided share in the residue.

I have not referred to the objections as to an outstanding legal
 estate under John Greene's will, as it was not pressed during the
 argument.

LEFROY, C. J.

This case comes before us on a point saved at the trial of an
 ejectment on the title, for the recovery of certain premises described
 in the summons and plaint as "the mountain and lands of Scart,"
 containing by survey 1342a. 1r. 20p., or thereabouts (the cultivated
 parts of which are described to be in possession and occupation of
 Michael O'Brien and several other persons therein mentioned), with
 all common of pasture thereunto belonging and appertaining. The
 several defendants having taken defence (the defendant Griffith for
 the whole, and the other defendants for the respective portions in
 their possession), the cause came on for trial before the Lord Chief
 Baron, who, at the instance of plaintiff's Counsel, when his case
 was closed, and the defendants' Counsel declining to go into evi-
 dence, directed the jury to find for the plaintiff for an undivided

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share of the lands in the summons and plaint mentioned, in the proportion which 256a. 3r. 24p. bear to 880a. Or. 27p., reserving to the Counsel for the defendants liberty to move respectively as mentioned in their certificates. No objection was made as to the mode in which the jury was directed to ascertain the measure of plaintiff's right, and the learned Chief Baron states that he was not required by either party to leave any question to the jury. The objections stated in the certificates are those upon which the case has been argued according to the leave reserved; and are as follow:—"That no evidence of possession or use, or enjoyment of "the mountain sought to be recovered was shown or proved; and "that the only title shown by the plaintiff was to the mountain held "and enjoyed with the lands of Graigemore and Graigebeegg before "the 8th of May 1793; and that no evidence whatever had been given "of any possession or enjoyment by those under whom the plaintiff derived, of any part of the mountain sought to be recovered "in this ejectment, with the lands of Graigemore and Graigebeegg, "nor the slightest evidence of any acts of ownership or dominion "from which such possession or enjoyment could be inferred; "and that no possession or enjoyment ever went with any of the "documents put in evidence." The case has accordingly been argued upon the points reserved, and we are all of opinion that the plaintiff is entitled to hold his verdict against the defendant Griffith; but my Brothers think that he is not entitled to hold it against the other defendants. I must say that I cannot see any ground for the distinction. It is true there is some evidence against Griffith which does not apply to the others (as he has executed the fee-farm grant, and would therefore be bound by estoppel); but, exclusive of this, it appears to me that the plaintiff has given abundant evidence to entitle him to retain his verdict against all the other defendants, by an unbroken chain of title, accompanied by possession, from the patent to the present time. No question is made as to the title and possession of the Crown in 1668; we have then the patent containing a grant to Robert Beard of 256a. 3r. 26p., in the profitable lands of Graigemore and Graigebeegg, together with a share of unprofitable lands,

in proportion to his share of the profitable. Now the question in this case virtually turns upon this—"whether the mountain of Scart was part of the unprofitable land, to a share of which Robert Beard was entitled by the patent." To establish this, we have first the Book of Distributions (which we all hold to be admissible evidence) and the Down Survey (an enlarged tracing of which was proved by Mr. Roberts the surveyor). From these documents, as I understand them, it appears to me that the mountain of Scart was part of the unprofitable land, a share of which was given to Beard, along with the portion of Graigebegg and Graigemore the profitable land. The subsequent evidence strongly corroborates this view of the case, and indeed seems to me to establish it beyond a doubt. By the lease of the 19th of September 1701, made by the representatives of Beard the patentee to Robert Cook of these lands, they are described thus:—"All that the share, lot and portion of and belonging to the said Katherine Beard, John Beard and Michael Wicks, lying and being in *Graigemore and Graigebegg*, containing 256a. 3r. 24p., be the same more or less, 'profitable land, plantation measure:'" the very description in the patent. Then follow general words—together with the "mountain and mountain lands;" to hold all and singular the said demised premises and lands, with "the share and proportion" of the towns and mountain, commons, commodities and advantages thereunto belonging "or otherwise appertaining." It is not alleged, and certainly there is no evidence, that a share or proportion of any other mountain than *Scart* was intended to be described as belonging to the lands of Graigemore and Graigebegg; but the next document puts an end to any surmise of that sort, namely, the lease bearing date the 8th of May 1793 (made immediately after the expiration of the lease of 1701), by Catherine Griffith to John Greene, of "all that and those the town and lands of Graigemore and Graigebegg," together with the "mountain and common" theretofore therewith held and enjoyed, with other lands stated to have been, by indenture bearing date the 19th day of September 1701, demised to Robert Cook; and are referred to as meared and bounded as described

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in a map to said lease of 1793 annexed, to hold for three lives, to him and his heirs, for ever, with a covenant for perpetual renewal, at a rent of £400 per annum, of the then currency of Ireland. The parties to this lease of 1793, John Greene and Katherine Griffith, are represented by the plaintiff Poole and defendant Griffith, the parties in this cause. By the language of this lease, and the map annexed to it, the following facts are ascertained beyond a doubt; first, that the mountain of Scart was demised by this lease. This is proved by the maps and the evidence of Mr. Roberts the surveyor, as to whose testimony no question is made; secondly, it is ascertained that "the mountain" referred to in general terms in the lease of 1701 to Robert Cook, was the mountain of Scart; for the mountain demised by this lease of 1793 is described as having been held and enjoyed by the said Robert Cook, with the other lands held by him under said lease of 1701: thirdly, that the mountain of Scart is the mountain demised by the fee-farm grant; the identity of the map annexed to the fee-farm grant, with the map annexed to the lease of 1793, being proved by Mr. Roberts: and, fourthly, it is further proved that it has been held and enjoyed under the several instruments hereinbefore mentioned, and for which a rent has been paid under every instrument demising the same, from the year 1701 down to the present time. This latter fact being admitted by and on behalf of all the defendants under the consent order in the cause, if this be not evidence of title, with possession under it, I know not what can be so. Indeed I should have been disposed to hold, if necessary, that the lease of 1793 with the payment of rent under it, with the fee-farm grant, and the payment of rent under it, and the identity of the map annexed to it with the maps annexed to the lease of 1793, would have been quite sufficient to support a verdict against all the defendants, who have shown nothing but a mere possession; which I admit may be a very good *prima facie* case for a defendant in ejectment, but which is no more than a *prima facie* case; and when an actual title, with possession under it within twenty years, is shown by the plaintiff, the defendant must displace that by a title shown on his part calculated to dis-

place it, and cannot rest on simple possession. I can understand indeed, if he could show an adverse possession for twenty years, it would constitute such a title; but it lies on him to prove it, which has not been done in this case.

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In my opinion therefore the plaintiff is entitled to succeed in this case against all the defendants, but, as my Brothers think otherwise, the cause shown must be disallowed as to the other defendants.

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THE appeal and cross-appeal were argued by *J. E. Walsh, Hemp- hill, and Tandy*, for the plaintiffs. T. T. 1863.

* Serjeant *Sullivan*, Serjeant *Armstrong*, and *Edward Johnstone*, appeared for the principal defendants.

T. Harris and *Palles* were heard for the sub-defendants.

Cur. ad. vult.

MONAHAN, C. J.

This case comes before the Court on two appeals—one by the plaintiff Mr. Poole, against an order of the Queen's Bench dated 31st of January 1863, by which a conditional order, obtained by the defendants, Michael O'Brien and other occupiers of a portion of the premises in the ejectment mentioned, to set aside the verdict obtained by the plaintiff, and enter it for these defendants, for the portion of the lands in their possession, and for which they had taken defence, was made absolute. The other appeal was by the

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* Before MONAHAN, C. J., PICOT, C. B., BALL, KEOGH, and CHRISTIAN, JJ., and FITZGERALD and DEASY, BB.

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 GRIFFITH. by them, and the conditional order discharged—the effect of the
 orders of the Queen's Bench being, that a verdict was entered
 for the defendants, Michael O'Brien and the other occupiers of a
 portion of the lands in their possession; and for the plaintiff,
 against the other defendants, for the residue of the premises.

The ejectment was brought, on the 12th of November 1861, on the title, for recovery of the possession of the lands of Scart, containing by survey 1342a. 1r. 20p., the cultivated part of which is described in the ejectment as being in the possession and occupation of Michael O'Brien and several other defendants particularly named. As already stated, Michael O'Brien and the other occupiers of the cultivated portions of the lands took defence, each for the part in his possession, amounting altogether to some one hundred or one hundred and fifty acres; and Mr. Griffith and others, I believe trustees in his settlement, took defence for the entire of the premises. The case was tried at the Assizes for the county of Waterford, before the CHIEF BARON; and the plaintiff, to support his case, gave in evidence—First, an attested copy of an extract from the Book of Distributions.—Second, an attested copy of an extract from the Down Survey, dated in the year 1637.—Third, an attested copy of the patent of the 20th of July 1668, from Charles the Second to Robert Beard and others, granting to Robert Beard, his heirs and assigns, 256a. 3r. 24p. of profitable land in Graigemoire and Graigebeg, with a proportionate part of the unprofitable lands thereto belonging, according to the number of profitable acres adjudged to them.—Fourth a lease of 19th of September 1701, from Catherine Beard, John Beard, and Michael Wicks, to Robert Cook, for ninety-one years from the 1st of May preceding. Though this document is a good deal defaced by time and accident, quite enough of it remains to enable anyone who examines it to see that the premises comprised in it are the premises granted to Robert Beard by the patent to which I have already referred.—Fifth, an agreement of the 12th of January 1793, between Cathe-

rine Griffith and John Greene.—Sixth, a lease of the 8th of May 1793, from Catherine Griffith to John Greene, for three lives, with covenant for perpetual renewal, at £400 a-year, of the premises comprised in the expired lease of 1701.—Seventh, a will of John Greene, the lessee in the lease of 1793, and a codicil thereto; the will was dated the 12th of December 1800.—Eighth, a fee-farm grant dated 13th of April 1850, from the defendant Mr. Griffith to Henry Houghton, of the premises comprised in the lease of lives renewable for ever of the 8th of May 1793.—And, lastly, a conveyance of the 15th of June 1859, from Henry Houghton to the plaintiff Mr. Poole, of the premises comprised in the fee-farm grant. There was also a consent order admitting the pedigree and death of the several members of the Greene family, as also certain proceedings in the lunacy of John Greene, the second son of the testator; and it was admitted that all rents had been paid under the lease of 1793 and the fee-farm grant of 1850, up to the present time. Mr. Roberts, a civil-engineer and surveyor, was examined as a witness on behalf of the plaintiff, the substance of whose evidence was, that the Down Survey of the premises granted by the patent of Charles the Second substantially corresponded with the map of the premises attached to the lease of 1793 and the fee-farm grant of 1850. None of the defendants gave any evidence at the close of plaintiff's case. Mr. *Walsh*, his Counsel, insisted that he had established his title and right to the possession of an undivided portion of the mountain of Scart, in the proportion which 256a. 3r. 24p. bear to 880a. and 27p., such being the proportion between the profitable land granted to Robert Baird by the patent of Charles the Second, and that granted to the other grantees named in the same patent. In the progress of the trial, Serjeant *Sullivan*, counsel for the defendant Mr. Griffith, objected to the admissibility in evidence of the extract from the Book of Distributions, as also to the article of agreement of the 12th of January 1793. With respect to the latter, during the argument, the objection was very properly abandoned. The agreement of January 1793 was as much an act of ownership exercised over the property as the leases of 1701 and 8th of May 1793, and equally admissible in evidence; so that the only piece of

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evidence to which any objection was pressed was the extract from the Book of Distributions. I confess I have personally been unable to discover how this extract was at all necessary for the plaintiff's case: without it, it abundantly appeared that the premises comprised in the Down Survey, to which no objection was made, were those demised by the leases of 1701, 1793, and the fee-farm grant of 1850; and, as no question was left to the jury on the evidence, I very much doubt that, even if the evidence was improperly received, we would be bound, on that ground, to grant a new trial; but it is unnecessary to consider this question; as, notwithstanding the case of *The Archbishop of Dublin v. Trimleston (a)*, we are of opinion that it was in this case properly receivable in evidence, though we are unable to state with any certainty the precise provisions of any statute under which it was compiled; still, having been so compiled under public authority, preserved among the records of the office always used for public purposes, we are of opinion that it was properly received in evidence with the extract from the Down Survey, more fully to connect the survey with the patent of Charles the Second, on the grounds particularly stated by Baron Greene, in the case of *Knox v. Mayo (b)*.

At the close of plaintiff's evidence, Serjeant *Sullivan*, for the defendant Mr. Griffith, objected, that as plaintiff's title to the mountain in dispute under the lease of May 1793, and the fee-farm grant of 1850, was by the description "all that and those parts of the towns and lands of Graigemore and Graigebeg, commonly called and known by the names of Graigavurra, Upper Derry and Lower Derry, containing, by a survey made thereof, 485a. Or. 2p., together with the mountain and common heretofore therewith held and enjoyed," that there was no evidence of any part of the mountain or common now claimed by the plaintiff having, previous to May 1793, been held with the profitable parts of Graigemore and Graigebegg thereby demised; and therefore that plaintiff should be nonsuited, or a verdict directed against him. The answer to this is, the patent of July

(a) 12 Ir. Eq. Rep. 267.

(b) 9 Ir. Chan. Rep. 199, 201.

1668 grants 256a. 3r. 24p. profitable land in Graigemore and Graigebeg, together with a certain proportion of the profitable lands thereunto belonging, to Robert Baird, his heirs and assigns. The mutilated lease of 1701 clearly demises¹ to Robert Cook, for ninety-one years, what was so granted by the patent to Robert Beard; and nothing is better settled than that the production, from the proper custody, of an old expired lease, is evidence not merely of its execution, but that the premises comprised therein were demised thereby and enjoyed thereunder. It is not necessary on this point to do more than refer to the case of *Lessee Egremont v. Pullman (a)*. If this be so, we have the unprofitable land granted by the patent of 1767 enjoyed with the profitable land thereby granted by Robert Cook to the expiration of the lease of 1701, that is, to 1792; we have also an act of ownership exercised over the same by the memorandum or agreement of January 1791. Therefore, we are clearly of opinion that the lease of May 1793, and the fee-farm grant of 1850, which uses the same description, convey with the profitable lands the portion of unprofitable granted to Robert Beard by the patent of 1667.

The next objection relied on by the Counsel for the defendant Mr. Griffith, as also for the occupiers of the cultivated portion of the mountain, was, that no actual possession or enjoyment of the mountain now sought to be recovered was shown in the plaintiff, or any person through whom he claimed, within twenty years before the bringing of the ejectment, and therefore that plaintiff's title was barred by the Statute of Limitations.

With respect to this precise objection, several Members of the Court entertain very serious doubts whether such an objection was made at the trial, or is now open to the parties; the particular objection made at the trial being, that no evidence of possession or enjoyment had been at all given of any part of the mountain, by any person through whom the plaintiff claims. But notwithstanding these doubts as to the objection being open to the parties, the Court think it better to dispose of the case as if the objection had been pointedly made. More especially as

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the case appears to have been disposed of in the Court of Queen's Bench on this objection. The first answer given to this objection by plaintiff's Counsel was that, by the will of John Greene, the lessee in the lease of 1793, successive life estates were created in the premises in question; that plaintiff's title did not accrue until the death of his uncle, John Greene the lunatic, in the month of July 1858, and therefore his rights would not be barred, even though the preceding tenants for life under the will of the testator John Greene had been more than twenty years out of possession of the mountain in question; and plaintiff's Counsel also gave this further answer to the objection, that no acts or default of the lessee in the lease of 1793 could defeat the reversionary rights of the lessor in that lease; and therefore that on the expiration of the lease of 1793, in 1858, by death of the surviving life, the defendant Mr. Griffith would have had a right to re-enter, which he conveyed to Mr. Houghton by the fee-farm grant of 1850; and that Houghton having in 1859 conveyed the premises comprised in the fee-farm grant to the plaintiff, plaintiff was entitled to maintain the present ejectment, even though those deriving under the lease of 1793 had been more than twenty years out of possession. With respect to the argument arising from the will of John Greene, we are not prepared to hold that the waste or mountain lands now in dispute passed by the specific devise contained in that will. The clause under which it was argued that they so passed is this:—"Whereas I am seized of and entitled to the lands of Upper "and Lower Derry, Graigavurra, Leseenoona and Tilleccoole, by "virtue of a lease for three lives, with covenant for perpetual "renewal, subject to a certain yearly rent therein mentioned; now "I devise the said lands, subject to the said rent payable thereout, "to Beverly Hearne and Christopher English, their heirs and "assigns, upon trust, and to and for the uses, intents and purposes "following, that is to say, to the use of my son Rodolphus Greene, "and his assigns, for the term of his life," with several remainders over. On referring to the lease of 1793 and the map attached thereto, it would appear that Graigavurra, Upper and Lower Derry, are the names of the sub-denominations of the profitable portions

of the lands of Graigemore and Graigebeg, demised by the lease of 1793; but there is nothing whatever to show that the mountain lands of Graigemore and Graigebeg, though held with Upper and Lower Derry, and Graigavurra, had acquired the name of the latter; therefore we are unable to find in the will any words to pass any part of Graigemore and Graigebeg, except the sub-denominations particularly named. It has been argued that as the lands are described as held under a lease for lives renewable, subject to a certain rent, that the devise would include everything included in such lease, and so subject to such rent. We are not prepared so to decide; and from the view the majority of the Court takes of another question in the case, it is not necessary to decide one way or the other whether the mountain in question passed by the clause to which I have referred. Of course, if the mountain in question did not pass by this clause, it did pass by the residuary clause to the testator's son Rodolphus Greene in *quasi* fee. I may here mention an objection made by defendants' Counsel, namely, that if the lands passed under the will of John Greene, the trustees therein named would have taken the legal estate thereunder, on the ground that the Statute of Uses did not apply to devises of lands held under a freehold lease. We are not aware of any authority for such a distinction; and see no reason to doubt that a devise of lands held under a lease for lives renewable for ever, to trustees to the use of a third person, would pass the legal estate to such third person. Next in order comes the question which was so much discussed, as to the effect of the fee-farm grant executed by the defendant Mr. Griffith to Mr. Houghton in the year 1850; and the conveyance by Mr. Houghton to the plaintiff, dated the 15th of January 1859. The question whether the fee-farm grant to Mr. Houghton can operate under the Renewable Leasehold Conversion Act, and if so, what effect a fee-farm grant executed thereunder will have on a portion of the premises comprised therein, to which a third person has acquired a title by the Statute of Limitations, is one of so much importance that the majority of this Court, I may say all except the CHIEF BARON, are of opinion it is more advisable not to decide it in this

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case, as we are of opinion that this case can be decided on another point, without reference to the Renewable Leasehold Act; and accordingly I shall consider the case as if the freehold lease of 1793 was still unexpired, and that the fee-farm grant operated as an enlargement thereof; and that on the death of John Greene the testator, the mountain or waste lands now in dispute passed by his *will* or by descent to Rodolphus Greene, the eldest son of the testator, in *quasi* fee; the profitable lands having vested in him as tenant for life under the same will. On the grounds I have already stated in relation to the lease of 1701, we are of opinion that the lease of 1793, and the payment of rent thereunder by the persons entitled thereto, following the lease of 1701 and agreement of January 1793, is evidence not merely of title but possession in the lessee under that lease at the time of its execution. The lessee in that lease died in January 1801, when the title of Rodolphus his son accrued; he died in January 1807; when the title of John Greene, who afterwards became a lunatic, accrued. It is an admitted fact that the rent reserved by the lease of 1793 was regularly paid by or on behalf of the lunatic to its expiration in 1858, when the title of the present plaintiff accrued. Under these circumstances, the several Members of the Court, with the exception of my LORD CHIEF BARON, are of opinion that the execution and payment of rent under the lease of 1793, is, to say the least of it, some evidence of not merely the title, but the continuance in possession under that title, of John Greene the lunatic, to his decease; and it now being settled that, to establish a defence under the Statute of Limitations, it is not sufficient to show that the plaintiff having title is out of possession, but that some other person has been in possession for the required period of twenty years. It lay on the defendants, the occupiers (of whom nothing is known but that they were in occupation of portion of the premises when the ejectment was brought), to show that they had such a possession, and for such a length of time as would defeat the plaintiff's title; and with respect to the residue of the premises, of which nothing is known but that in 1850 the defendant Mr. Griffith conveyed it to Houghton by the fee-farm grant, we cannot see what pretence he or his trustees can have to

resist the plaintiff's case as to the residue of the premises. The result therefore will be, that the appeal of Mr. Griffith and his trustees will be dismissed with costs, and the appeal of plaintiff allowed without costs. Judgment therefore will be entered for the plaintiff for an undivided portion of the entire premises, as 256a. 3r. 24p. bears to 880a. Or. 27p.

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I concur in the opinion of the other Members of the Court, that, as to the defendant Griffith, the judgment of the Court below ought to be affirmed; and I adopt the reasons which have been given for that opinion. I also concur in the conclusion at which they have arrived, that, as to the second class of defendants (O'Brien and others), the decision of the Court below ought to be reversed, and the verdict for the plaintiff ought to stand. But I have come to that conclusion for reasons different, I believe, from those which influenced the other Members of the Court; those reasons I wish now to state. I am not of opinion that, if this case were treated as one in which the legal estate under the lease of 1793 were still continuing, and were vested in the plaintiff, he could sustain the verdict against the second class of defendants. On the contrary, I am of opinion that, if that were the real state of the case, those defendants would be entitled to have a verdict entered for them, upon the grounds stated in the judgment of my Brother HAYES, and more fully (as appearing in the manuscript report) by my Brother O'BRIEN, in the Court below. The plaintiff gave no evidence of possession had by him, or by any person from whom he derives, of the premises for which the second class of defendants have taken defence, or of any part of the Scart mountain, subsequently to the execution of the lease of 1793. Neither did he give any evidence of the receipt of rent at any time by him, or by any person from whom he derives, out of or in respect of those premises, or out of or in respect of any part of the Scart mountain. No evidence was given showing any privity whatever between the plaintiff, or any person from whom he derives, and these defendants, or any former occupier of the premises of which these defendants

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are now in possession. For the purposes of this judgment I will assume that, in applying the 2nd and 3rd sections of the Statute of Limitations (3 & 4 W. 4, c. 27) to land, the same principle of construction is to prevail as was applied to quarries, in *McDonnell v. McKinty* (a); to mines, in *Smith v. Lloyd* (b); and to the site and soil of a road, in the judgment which I pronounced in *Tottenham v. Byrne* (c), and which, I believe, received the sanction of the Court of Error, on appeal; namely, that where there has been a discontinuance of possession of one person, the period of limitation shall be computed from the taking of possession by another. Still it appears to me that, howsoever the period of limitation shall be computed, the plaintiff in ejectment must show, as a part of his case, that that period had not elapsed when he brought his action of ejectment; otherwise, being out of possession, he does not show that he is entitled to maintain his action under the 2nd section of the 3 & 4 W. 4, c. 27; that is to say, he does not show that his action to recover the land is brought "within twenty years next after the time at which the right to bring such action first accrued."

It was said that the presumption of title arising from the defendants' possession is rebutted by a presumption (arising from the execution of the lease of 1793, and the payment of the rent reserved by it), that the possession of the Scart mountain was given to the lessee in 1793; and the further presumption that such possession continued until it should have been proved by the defendants that such possession had ceased, and that it had been followed by possession of the defendants, or of some person under whom they derived. I am not aware of any authority for holding that the effect of the defendants' possession can, in an action of ejectment on the title, be successfully encountered in this way. I have always understood the rule, constantly followed at *Nisi Prius*, to be what was laid down by Lord Mansfield, in *Taylor v. Horde* (d):—"An ejectment is a possessory remedy, "and only competent where the lessor of the plaintiff *may enter* ; "therefore, it is always necessary for the plaintiff to show that

(a) 10 Ir. Law Rep. 514.

(b) 9 Exch. Rep. 562.

(c) 12 Ir. Com. Law Rep. 376.

(d) 1 Burr. 60, p. 119.

"his lessor had a *right to enter*, by *proving* a possession within
 "twenty years, or *accounting for the want of it*, under some of
 "the exceptions allowed by the statute. Twenty years' adverse
 "possession is a *positive title* to the defendant; it is not a bar
 "to the *action*, or a *remedy* of the plaintiff only, but takes away
 "his *right of possession*. Every plaintiff in ejectment must
 "show a *right of possession* as well as of *property*; and therefore
 "the defendant needs not *plead* the statute, as in the case of
 "actions." This rule was applied rather strictly in a late case
 of *Nepean v. Doe d. Knight (a)*, decided under the late statute,
 3 & 4 W. 4, c. 27. In *Buller's Nisi Prius* the rule is thus
 stated:—"By 21 Jac. 1, c. 16, none shall make an entry into
 "land but within twenty years after their right or title shall
 "first descend or accrue to them, with the usual saving for infants,
 "femes covertes, &c. Therefore, if the lessor of the plaintiff be
 "not able to prove himself, or his ancestors, to have been in
 "possession within twenty years before the action brought, he
 "shall be non-suited." In a treatise "*on the Settling of Evidence for*
Nisi Prius," by Mr. *Espinasse* (the author of *Espinasse's Reports*),
 published about forty years ago, he says:—"First, it must be taken
 "to be a *general rule*, that in every case the plaintiff must be
 "prepared with evidence to prove that the land or tenements which
 "he seeks to recover in ejectment have not been held adversely to
 "him for twenty years; or rather, he must prove that he, or those
 "under whom he claims, have been in possession within that period."
 And, after stating what must be proved in particular instances to
 remove the bar of the Statute of Limitations, as in that of an heir-
 at-law, a feme coverte who has become a widow, &c., he concludes
 by saying—"If he is unable to give positive evidence to that effect,
 he must abandon the action." And in a text-book, which has been
 recently published, and compiled with much care (*Cole on Eject-*
ment, p. 6), the author states the rule, as established by *Taylor v.*
Horde, and *Nepean v. Doe*, in these terms:—"The statute is never
 "pleaded in ejectment; but the claimant always proves a legal title
 "to possession *not barred by the statute*." I cite the books last

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mentioned as indicating what, at several distant periods, has been in the Profession treated as the rule which in England governs the settled course of practice and procedure at the trial of actions of ejectment. I have never known this rule controverted; and, in my own experience, whatever proof may have been given of anterior possessory title, if evidence was not given of possession, or receipt of rent or profits had by the plaintiff himself, or by some person under whom he derived, within the period of limitation assigned by the statute, the plaintiff has been nonsuited, or the defendant has had a verdict. If the plaintiff, in the present case, should be treated as if he were the assignee of the lessee's interest under the lease of 1793, that interest still continuing, without any further proof of possession than the execution of the lease, and the payment of the rent under it, and if it should be held that the plaintiff, without giving any further proof of possession or enjoyment of the premises in question, or of any part of Scart, or any receipt of rent out of it, from 1793 to the present time, would, under such circumstances, be entitled to recover, because these defendants have not proved the origin of *their* possession, the *onus probandi* would be shifted from the plaintiff (who is out of possession, and who must recover, if at all, on the strength of his own title) on the defendants, who are in possession, and who are entitled to hold it until a better possessory title shall be shown. For this, I am not aware of any authority. It is certainly opposed to what my experience has been of the uniform practice. It would, in my judgment, be in effect, under the form of a mode of procedure, to take away that protection which the law has hitherto given to possession in the litigating of claims to land. According to the rule laid down by Lord Mansfield, uniformly applied in my experience under the old Statute of Limitations, the plaintiff, I conceive, could not have succeeded under the circumstances which I have mentioned. The 3 & 4 W. 4, c. 27, was framed rather to define and to limit, than to relax or extend, the remedies of parties relying upon previous title, against possession. I see nothing in the 2nd and 3rd sections of that statute, or in the authorities by which they have been expounded, to abridge the protection given to possession, or to shift from the plaintiff the

burden of *proving a possessory title unbarred by the Statute of Limitations.*

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If the view, which I am here controverting, of such a case as the present, were established, I see nothing to prevent a plaintiff in an action of ejectment on the title from proving his case against a person in exclusive possession, by simply producing a patent from the Crown, granting the lands (as here) in 1668, to an ancestor, from whom he traces pedigree, or to a person from whom he traces by mesne conveyances, a paper derivative title, proving payment, some short time after the patent was granted, of quit-rents reserved by the patents to the Crown; and closing his case without giving a particle of proof of any intervening act of ownership, of any possession, of any enjoyment, by receipt of rent or otherwise, on the part of the plaintiff, or of any person under whom he derives, down to the time of the trial, a period of nearly 200 years. The same may be said of a person claiming title under a lease for a long term of years, commencing more than a century ago, and still unexpired. To hold that, upon such evidence, a presumption must be made of the title continuing until some period, not shown by the plaintiff, within the time prescribed by the Statute of Limitations; and thus to cast upon the party in possession the burden of proving title, would be, in my opinion, to reverse, to a great degree, the relative positions of the plaintiff and defendant in actions of ejectment—to take away, under such circumstances, from the possessor of land, one of the protections which the law gives to possession, when it requires a plaintiff in actions of ejectment to recover, not upon the weakness of his adversary's title, but upon the strength of his own. It would be by a new rule of procedure in actions of ejectment, to alter very materially the effect hitherto given to the Statute of Limitations.

I am therefore of opinion that, if the lease of 1793 were still subsisting, and the plaintiff were the assignee of the lessee, he ought not, on the evidence appearing in this case, to be held entitled to recover against the second class of defendants (O'Brien and others) in this action of ejectment. And in that state of the

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case I should be of opinion that the judgment of the Court of Queen's Bench ought, as to those defendants, to be affirmed.

As to the decided cases before mentioned, I may observe that (as is stated in the judgment of my Brother O'BRIEN), in *M'Donnell v. M'Kinty* (a) evidence was given "that it was but lately "that persons in the occupation of the Creggan lands began to "quarry where the royalties were reserved;" that in *Smith v. Lloyd* (b), the rebutter was held bad because it did not make certain allegations which were necessary in order to show that the plaintiff was not entitled to rely upon the Statute of Limitations; and that in *Tottenham v. Byrne* (c), the plaintiff gave evidence tending to show that the obstruction complained of was not erected until within twenty-years before the bringing of the action. As to this point there was in that case conflicting testimony; but the evidence proved, and the jury found, that there had been continued user of the road by those for whose benefit it was plainly designed by the plaintiff.

I am however of opinion that, on another ground, the plaintiff is entitled to a verdict against O'Brien and the other defendants of the second class, and that the decision as to those defendants of the Court of Queen's Bench cannot be sustained.

Upon the evidence given in the case, showing as I conceive sufficiently, that Scart mountain was comprised in the demise made by the lease of 1793, and showing payment of rent under that lease, it is I think clear, that if this were a case of an action of ejectment brought by Mr. Griffith against these defendants upon the expiration of the lease of 1793, by the death in 1858 of the last *cestui que vie*, Mr. Griffith would be entitled to recover. So also would the grantee of Mr. Griffith's reversion in fee, in an action of ejectment brought upon the same event; namely, the expiration of the lease of 1793. Upon the assumption that the defendants had held exclusive possession for more than twenty years, without payment of rent or written acknowledgment of title, and there being no disability or outstanding estate to prevent the person having the

(a) 10 Ir. Law Rep. 514.

(b) 9 Exch. Rep. 562.

(c) 12 Ir. Com. Law Rep. 376.

lessee's estate in the lease recovering during that time, still it would have been the lessee's estate only that would have been barred by the Statute of Limitations. The grant in fee, made to Mr. Houghton in 1850, was not made to him as committee of the lunatic; it was not even made to him as one who was trustee of the estate for the lunatic, or who was then at all a trustee for the lunatic; but it was made to him as a person named (as I collect) to be a trustee for the special purpose of becoming a grantee, instead of the committee of the estate, and for no other purpose. It appears to me that he was not, in that capacity, made an owner by force of the 17th section of the Renewable Leasehold Conversion Act (12 & 13 Vic., c. 105). That section is in these words:—"That where the owner of any reversion, lease, underlease or estate, is a minor, idiot, lunatic, *feme covert*, or is not within the United Kingdom, the guardian, trustee, committee of the estate, husband or attorney respectively of such owner shall, for the purposes of this Act, be substituted in the place of such owner, and shall and may execute such grants and counterparts, make such agreements, and do all such other acts which such owner, if not under disability or out of the United Kingdom, might and should have executed, made and done under this Act."

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It appears to me that the person who is contemplated as "trustee" in that section, is the person who is a trustee *at the time when he is substituted for the person for whose benefit he is to accept the grant*. I do not think a person is such trustee who merely accepts the grant for the special purpose of taking the grant for the actual owner's benefit. If he only becomes a trustee by the act of accepting the grant in fee, or by the act of executing the grant in fee to him, it would seem to be a perversion of terms to assert that he *was* a trustee *when he was substituted* for the actual owner. In the deed of grant of 1850, which is in evidence in this action, John Greene the lunatic is expressed to be made a party to the deed, which recites that the lessee's interest is vested in him; and it is stated that, the Master in the lunacy matter in the Court of Chancery having reported that it would be for the benefit of the lunatic that the fee-farm grant should be made to Mr. Houghton.

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in trust for on and behalf of the lunatic, it was ordered by the Court that Mr. Griffith should execute the fee-farm grant to Mr. Houghton *in trust for and on behalf of the lunatic*. Upon the face of the deed therefore it appears that Mr. Houghton never became a trustee until the deed was executed. The true force and meaning of the 12 & 13 *Vic.*, c. 105, s. 17, appear to me to be that, *reddendo singula singulis*, the fee-farm grant shall, in the case of any of the disabilities specified, or in the case of absence from the country, be made to the guardian of a minor, to the committee of the estate of a lunatic, to the husband of a *feme covert*, to the attorney of an absent party, and to the trustee of any of these, if the property be vested in a trustee; although, but for this provision, the *equitable owner* of a perpetual leasehold of which the legal estate is in a trustee would, under the 35th and 37th sections, be the person to whom the grant should be made, where there is no trustee "in actual possession" or "in receipt of the rents," within the 35th section.

This being, as I conceive, the operation of the 17th section of the statute, it becomes unnecessary to consider whether or how far, if Mr. Houghton were an owner under the statute, there would have been a merger of the leasehold in the fee; and whether, if there had been a title gained by usurpation under the Statute of Limitations against the owner of the leasehold, such title could, after the death of the last *cestui que vie*, be substantiated against the owner of the fee? As the case stands, Mr. Houghton was, as I conceive, nothing more than a grantee of the reversion in fee under the grant of 1850. In 1858 the lease expired by the death of the last *cestui que vie*. In 1859, Mr. Houghton conveyed the estate to the present plaintiff. And this action of ejectment is now brought by the present plaintiff in assertion of the new right which accrued on the death of the last *cestui que vie* in 1858.

Upon this short view of the case I am content to rest my opinion that, as to the second class of defendants, the decision of the Court below should be reversed. In the result therefore I concur (though for different reasons) in what is the unanimous judgment of the Court.

I must, say however, that I am much disposed to think that, even if Mr. Houghton had been a trustee under the 12 & 13 Vic., c. 105, s. 17, and if he were as such to be treated as owner, nevertheless the second class of defendants, although they should have acquired a right under the Statute of Limitations (3 & 4 W. 4, c. 27, ss. 2, 3 and 34), co-extensive with the leasehold estate created by the lease of 1793, still would have gained, against the owner of the fee granted by the deed of 1850, no such right to enure after the death of the last *cestui que vie* of the lease. Mr. Houghton would, in that view of the case, have taken the fee as a trustee under the 17th section, but as a trustee for the purposes indicated in the 7th section of the statute. That section provides, that the estate of inheritance created by the grant "shall, from and after the execution of such grant be respectively vested in the same persons, for the same estates and interests, and be respectively subject to the same uses, trusts, provisoes, agreements and declarations, and be respectively charged with and subject to the same charges, liens, judgments and equities, as the estate held under the lease or underlease in perpetuity, to the owner of which the grant is made, and the reversion or estate by the owner of which the grant is made, were respectively vested in, subject to, and charged with, immediately before their conversion into such estates of inheritance as aforesaid was effected, or as near thereto as the different natures of the estates, and the circumstances of each case, will admit."

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If, by the mere grant and acceptance of the fee under the deed of 1850, Mr. Houghton became a trustee for the lunatic John Greene, within the meaning of the 17th section, still he must have taken the fee and become such trustee subject to the provisions of the 7th section. That section provides, that the estate of inheritance created by the grant "shall be vested in the same persons, for the same estates and interests," &c., "as the estate held under the lease or underlease in perpetuity to the owner of which the grant is made," &c., "or as near thereto as the different natures of the estates, and the circumstances of each case, will admit." And I am disposed to think that, when the grant was made to

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Mr. Houghton, expressly in trust for the lunatic, regard being had to the nature of the estate of the lunatic at that time, and to the circumstances of the case, the grant did not enure to the benefit of the second class of defendants who, at the utmost, must be taken to have acquired, by usurpation under the Statute of Limitations, only a right to the land co-extensive with the estate in the leasehold which existed when the grant was made. But for the grant of 1850, that estate would have expired in 1858. If the Statute of Limitations had not passed, and the grant of 1850 had not been made, these defendants would have had no right, at law, to the possession after the death of the last *cestui que vie*; and I apprehend would have had no right, in equity, to engraft their title, gained by usurpation, upon a subsequent renewal of the lease. Regard then being had to "the nature of the estate and the circumstances of the case," I am much disposed to hold the opinion, that the estate held under the lease of 1793 being, in 1850, vested in the lunatic, who was also then the last *cestui que vie* in the lease of 1793, Mr. Houghton acquired by the grant in 1850 the fee in the reversion; and was therefore entitled to maintain an action of ejectment when the last *cestui que vie* died in 1858.

If the effect of the fee-farm grant was to make Mr. Houghton the immediate owner of the entire fee, still I am much disposed to think that Mr. Houghton, taking it in trust for the lunatic, and for the purposes specified in the 7th section, and regard being had, as provided in that section, to "the nature of the estate and the circumstances of the case," at the time when the grant was made, would have taken it, under the 7th section of the statute, for the benefit of the lunatic, and would, for the benefit of the lunatic or of those deriving under him, have acquired, on the death of the lunatic, a new right to maintain an action of ejectment against the second class of defendants, whose interests were not saved or provided for by anything contained in the 7th section of the Renewable Leasehold Conversion Act; and that the plaintiff, deriving under the conveyance from Mr. Houghton, had that right when this action was brought. I do not however wish to rest my judgment on this ground, as this point was not argued before us.

With respect to the extract from the Book of Distributions, I concur in the opinion that it is not necessary to decide whether it was or was not admissible in evidence: it was wholly immaterial. The plaintiff's case, as to the identity of the Scart Mountain with what passed by the patent of 1668 and by the leases of 1701 and 1793, was established without the aid of the Book of Distributions. No objection was made, and no question was raised, with respect to the *proportion* of the mountain claimed by the plaintiff, if he was entitled to recover at all. If the extract from the Book of Distributions had not been given in evidence, still the Judge must have directed a verdict for the plaintiff. Where such a direction *must have been given* if the evidence objected to had not been received, and where that evidence *cannot have influenced* the verdict, the reception of it cannot constitute a ground for granting a new trial.

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The other Members of the Court concurred.

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In an action on a covenant **THIS** was an action of covenant. The summons and plaint contained two paragraphs. The first stated that, by an indenture of lease against an assignee, the lease, the plaintiff, Sir George Shee, demised the house and lands first count averred generally that all the estate and interest of the lessee in the demised premises came by assignment to the defendant; the second count set out the title of the defendant as assignee; and, as one of the steps of that title, stated the will of the lessee, whereby he devised all his property to his widow for life, with power of appointment among her three daughters, of whom the defendant was one, and averred that in execution of that power the widow had appointed the demised premises to the defendant; the count then stated the death of the widow and entry of the defendant. The defendant traversed the averment in the first count, and as to the second pleaded that the widow had not executed the power of appointment as alleged.

The plaintiff at the trial stated and proceeded to prove the title of the defendant as set out in the second count, but failed to show that any appointment under the power had in fact ever been made; but, in order to show exclusive possession by her of the demised premises, he proved the following acts of ownership:—that, since the death of her mother in 1859 (four years before the commencement of the action), the defendant and her husband had resided on the premises, and farmed the land, and that after his death the defendant alone had managed and received the rents of the property; that she had applied by letter to the plaintiff for a renewal of the lease to her, describing herself as representative of her father; and that, after judgment by default in an ejectment for non-payment of rent, she had redeemed the premises. A verdict was directed for the defendant on both issues.

Held, per MONAHAN, C. J., BALL and KEOGH, JJ. (*dissentiente* CHRISTIAN, J.), first, that the evidence of possession was sufficient to sustain the averment in the first Count.

Secondly, that, assuming that the plaintiff could not recover on the second count, by reason of his having failed to prove one of the averments contained in it, viz., a due execution of the power, he should not be precluded from recovering on the first count.

Thirdly, that assuming the defendant was tenant in common with her two sisters of the demised premises, that could not be relied on under the traverse to the first count, but must be pleaded in abatement.

Held, per MONAHAN, C. J., that the evidence of possession was sufficient to support the second count.

Held, per CHRISTIAN, J., firstly, that the rule that in an action against an assignee of a lease, the landlord is allowed to rely on evidence of possession as *prima facie* evidence of assignment, is founded on his presumed ignorance of the real state of the defendant's title; but if the landlord relies on a particular derivation of that title, the reason of the rule ceases; and this applies not merely to the case where the landlord relies upon that particular derivation of title in pleading, but where he founds his right of action upon it at the trial in statement and in proof; and that, as the plaintiff made a due execution of the power part of his case at the trial, he was bound to prove it.

Secondly, that, assuming that the acts of ownership showed exclusive possession by the defendant, the period (four years) over which they extended was not sufficient in law to found the presumption of a due execution of the power.

Thirdly, that the evidence did not prove exclusive possession by the defendant, but was as consistent with the non-existence as the existence of a deed executing the power; and therefore that the plaintiff was not entitled to have either issue left to the jury.

of Prospect and Fairy Hill to one Bernard Daly, the father of the defendant, for one life or twenty-one years; and that the said lease contained a covenant to repair. The paragraph then stated that, after the making of the said indenture, and during the demise thereby granted, to wit, on the 10th day of March 1859, all the estate, right, title, interest, term of years then to come and unexpired, property, profit, claim and demand whatsoever, of him the said Bernard Daly, of and in the said demised premises, by assignment thereof then made, legally came to and vested in the defendant. Then followed a statement of the entry of the defendant, the breach of covenant, and the claim for damages.

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The second paragraph, after stating the demise, as in the first, and that the life in the lease was still in existence, proceeded to set out the title of the defendant as follows:—That the said Bernard Daly died in the month of October 1852, seised or possessed of the said premises, under and by virtue of the said indenture of lease, leaving his wife Julia Daly, and three daughters, Anna Maria Daly, Julia Daly (the defendant), and Jane Daly, his co-heiresses-at-law him surviving. That the said children are still living. That by his will, the said Bernard Daly, after bequeathing certain pecuniary legacies, devised and bequeathed the remainder of all the property which he should die worth (including the said demised premises), and all other his freehold and personal property, to his wife Julia Daly, during her natural life, and from and after her death, share and share alike, between his said three daughters, in such manner as the said testator's wife Julia Daly should divide the same. The paragraph then stated the grant of probate of the will to Julia Daly, the widow; the marriage of Julia Gray, otherwise Daly, to Joseph Burton Gray, and the death of Julia Daly, the widow; and proceeded as follows:—"That the said Julia Daly, the widow, in pursuance of "the said will, divided the property of the said testator among "his said daughters, and gave to the said Julia Gray, otherwise "Daly, the lands and premises demised by the said lease of the "9th of July 1846, and the estate and interest thereby created, "as and for her share of the property of the said testator; and

E. T. 1864. "gave to the said Anna Maria Daly and Jane Daly other portions
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There was then a statement of the entry of the widow, after the death of the testator; of the entry of Joseph Burton Gray in right of his wife, after the death of the testator's widow; and of the entry of Julia Gray (the defendant), after the death of her husband; and the paragraph concluded as the first.

Defences; first, as to the first paragraph—That all the estate, &c., of the said Bernard Daly, in the premises, in the summons and plaint mentioned, did not come to or vest in the defendant, therein alleged.

Secondly, as to the second paragraph—That the said Julia Daly did not divide the property of the said Bernard Daly amongst his said daughters, or give to the said defendant the said premises therein mentioned, as in the said paragraph alleged.—Issues as thereon.

The case was tried before the Hon. Mr. Justice CHRISTIAN, at the last Summer Assizes for the county of Galway. The lease of 1846 having been admitted, the plaintiff read in evidence the probate of the will of Bernard Daly, and proved the death of the said Bernard Daly in the year 1852, and of his widow in the year 1859. The plaintiff then, in order to establish an exclusive possession by the defendant of the premises in question, went into evidence of acts of ownership by her, and proved that, after the death of her mother, the defendant had resided on the premises with her husband, until his death in September 1859; and that shortly after his death she had gone to reside in Dublin; and that, from the death of her husband up to this period, she alone had managed the property, and farmed the lands.

Evidence was also given by Mr. O'Loughlen, the defendant's attorney, that, after the defendant had gone to reside in Dublin, he had managed the property for her, and on her behalf, up to the commencement of the action; and a letter from the defendant to the plaintiff was read in evidence, in which she described herself as representative of her father, and applied as such representative for a renewal of the lease. It was also proved that, subsequently

to the death of her husband, an ejectment for non-payment of rent was brought, in which the defendant, and a number of other persons, who were undertenants, were named defendants; but no mention was made in that ejectment of her two sisters. No defence was taken; and after judgment by default, the premises were redeemed by O'Loughlen, acting on behalf of the defendant.

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It did not appear what had become of the defendant's sisters; no evidence was given that any provision had been made for them out of their father's property, or that they were in the enjoyment of any part of it.

At the close of the plaintiff's case, the defendant's Counsel called on the learned Judge to direct a verdict for the defendant on all the issues, as no evidence had been given of an execution by Julia Daly, the widow, of the power contained in Bernard Daly's will. Counsel for the plaintiff, on the other hand, required his Lordship to leave it to the jury, on the evidence, to presume an appointment, or other form of assignment, to the defendant.

His Lordship refused to adopt the latter course, for the following reasons, as stated in his report:—

That as the plaintiff did not rest only upon evidence of possession, but went into proof of the actual state of the title, by proving the leasee's will and his death; and as under that will the lessee's widow was assignee of the interest down to her death in 1859, and after her death her three daughters became assignees as tenants in common, unless she had executed her power of division, or they had, after her death, made partition amongst themselves, the plaintiff was bound to give some proof of the execution of the power, or of the making of such partition; and his Lordship was of opinion, and so stated in his report, that the acts of defendant, relied upon by the plaintiff, did not constitute a case on which a jury ought to be allowed to found such a presumption as the plaintiff contended they were at liberty to make, having regard to the shortness of the period (four years) over which these acts ranged, and to the circumstance that they were all more or less capable of being accounted for by the defendant's position as one of three tenants in common. His Lordship accordingly directed a

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verdict for the defendant on all the issues, and reserved liberty to the plaintiff to move to change that verdict into one for him for the amount of the dilapidations, if the Court above should be of opinion that he (the learned Judge) should have left the issues to the jury, and that they ought, if left to them, to have found them for the plaintiff; the Court to be at liberty to draw the same inferences from the evidence which the jury could have done. The jury accordingly found for the defendants, and assessed the damages at £75.

The facts of the case are more fully stated in the judgments.

P. Blake having, on the 5th of November 1863, obtained a conditional order that the verdict had for the defendant in this case should be set aside, and a verdict entered for the plaintiff for the sum of £75, pursuant to the leave reserved; or that the said verdict should be set aside, and a new trial granted on the ground of misdirection of the learned Judge, and of the verdict being against the weight of evidence,—

W. Burke and *Quin*, now showed cause.

Blake and *Concannon*, in support of the conditional order.

W. Burke and *Quin*.

In the first count it is alleged that all the estate, right and title of Bernard Daly came to the defendant. That allegation is traversed by the defendant; and the issue is, whether all the estate, right and title of Bernard Daly came to the defendant, as in the first count alleged. The evidence does not support the plaintiff's allegation; for instead of proving that all the estate, &c., of Bernard Daly came to the defendant, the plaintiff's evidence showed that she was tenant in common along with her two sisters. *Hare v. Cator* (a) is exactly in point. In that case the plaintiff alleged that the defendant was assignee of all the estate, right and title of Lord Bolingbroke; the evidence showed he was only assignee of part; and it was held that the variance was fatal; and in that case

(a) Cowp. 766.

there was no plea in abatement. *Curtis v. Spitty* (a) is also a direct authority; not only is it identical in its facts with the present case, but it came before the Court in the same way; at page 759, Tindal, C. J., says:—"Hare v. Cator is a direct authority upon the very point, that if the plaintiff alleges in his declaration that the whole interest in the lease came to him by assignment, and the defendant traverses the allegation, it is a fatal variance if it appears in the evidence that the defendant was assignee of parcel only of the lands originally demised."

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In the present case, the plaintiff by showing that the defendant is tenant in common with two other persons, proves that all the estate, right and title of the testator did not come to the defendants; in fact he puts himself out of Court, for he proves the negative of the issue. The case of *Merceron v. Dowson* (b) does not apply; the defence there was neither a traverse nor a plea of confession and avoidance, and therefore was no answer to the action at all. In *Heap v. Livingston* (c) the defendant was joint tenant with the others, and not tenant in common, and in that case Parke, B., after referring to *Hare v. Cator*, takes that distinction, and says:—"But in this case the defendant does not take part of the estate, he is seised *per my et per tout* in the whole."

As to the second count, it is admitted that the plaintiff proved all his allegations and all the steps of the defendant's title, except the execution of the power given to the defendant's mother by the will of Bernard Daly. The words of the will are, that after the death of the widow all the testator's property is to go share and share alike between his three daughters, in such manner as the widow should divide the same. That power could not be validly executed without giving some part of the leasehold premises to each of the daughters. It was contended at the trial that the possession by the defendant was evidence from which the jury might presume a valid execution of that power. The possession in the present case was only for four years. No case can be found in which the execution of a power was presumed from a possession of such

(a) 1 Bing., N. C., 756.

(b) 5 B. & Cr. 484.

(c) 11 M. & W. 896.

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short duration. In the case of *Sumpton v. Sennes* (a) an appointment under a power was presumed from possession for more than twenty years. There is no case in which possession for less than twenty years has been held presumptive evidence of the execution of a power. In *Sumpton v. Sennes* it is from the fact of the party having been in possession for twenty years and longer that the execution of the power is presumed. That length of time would confer a title against all the world. The letter written by the defendant to the plaintiff, and the redemption of the lands from eviction, are acts consistent with her being tenant in common; they are acts which one tenant in common might do for all. If the Court think there was not evidence of the execution of the power, the plaintiff must fail on the second count, for the execution of the power is specifically alleged in the count, and if no evidence be given of it, the variance is fatal. If the Court be of opinion that there was evidence from which the jury might have presumed an execution of the power, the most they will do will be to send the case to a new trial; the verdict will not be changed into one for the plaintiff on mere presumptive evidence.

They cited *Bristow v. Wright* (b); *Savage v. Smith* (c), and *Doe d. Batten v. Murless* (d).

P. Blake, with him *Concannon*.

If the defendant chose to rely on the fact of her being tenant in common with her two sisters as a defence to the present action, she should have pleaded in abatement.

In *Merceron v. Dowson* (e) it is laid down that in an action of covenant against one of several tenants in common, for the whole rent, the defendant should plead in abatement. In *Heap v. Livingston* (f), which was an action of covenant for rent, the defendant pleaded in abatement the non-joinder of another joint-tenant, and it was contended that the plea was a good plea in bar; but Parke, B.,

(a) 2 Keble, 261.

(c) 2 H. Bl. 1101.

(e) *Ubi supra*.

(b) 2 Douglas, 665.

(d) 6 M. & Sel. 110.

(f) *Ubi supra*.

says, at page 900, "His plea is properly pleaded in abatement, but for the reason before given is bad in form."

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All that is necessary to be presumed here is an execution of the power contained in the will of Bernard Daly. That power might have been validly executed by letter: *Sugden on Powers*, p. 213, 8th ed. Such a presumption is not a violent one. It has been contended that no execution of the power would have been valid unless part of the real and part of the personal property were given to each object of the power. That is not so. In *Sugden on Powers*, 8th ed., p. 427, it is said:—"If a fund, consisting partly of real and "partly of personal estate, be authorised, as a common fund, to be "appointed amongst several objects, so that each must have a share, "yet, it is not necessary to give a part of each fund to each object; "but if there are two, for instance, all the realty may be given "to one, and all the personalty to the other:" and for that he cites *Morgan v. Surman* (a).

Quin, in reply.

Cur. adv. vult.

On this day the Court delivered judgment.

May 4.

MONAHAN, C. J.

This case comes before the Court on a motion to set aside the verdict had for the defendant, and to enter up verdict for the plaintiff, pursuant to leave reserved by my Brother CHRISTIAN at the trial. I am now about to deliver the judgment of the majority of the Court, namely, my Brothers BALL, KEOGH, and myself; my Brother CHRISTIAN, who dissents from that judgment, will state the reasons which have induced him to do so. The facts of the case are as follows:—

The action was one of covenant, brought by Sir George Shee against the defendant Mrs. Julia Gray for breach of a covenant contained in a lease of the 9th of July 1846.

The declaration contained two counts, the first stated the making of the lease, and that it contained a covenant on the part of the lessee Bernard Daly, the father of the defendant, to keep the

(a) 1 Taunt. 289.

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demised premises in repair. The lease was for one life or twenty-one years, the life being in existence and the years unexpired, and the allegation is, that after the death of Bernard Daly all his estate and interest under the lease by assignment thereof legally came to and vested in the defendant; and there is then an averment that the premises became out of repair, and for that breach the plaintiff seeks damages.

To that count the defendant pleaded a simple traverse, that all the estate and interest of the lessee did not come to or vest in defendant as alleged. The second count stated as follows.—[His Lordship read the second count, the plea thereto, and the issues.]

What occurred at the trial was this:—The lease being admitted on the pleadings, the plaintiff gave in evidence an attested copy of the probate of the will of Bernard Daly; he also proved that Bernard Daly died about the year 1852 leaving his widow and three daughters surviving him, and that on his death his widow entered into possession of the demised premises, and continued in possession until her death in 1859. It also appeared in evidence that the defendant Mrs. Gray and her husband resided in the house with the widow during her lifetime, and that after her death they occupied the premises until the death of Mr. Gray; and after his death that Mrs. Gray continued in occupation. It further appeared that, subsequently to the death of Mr. Gray, an ejectment for non-payment of rent was brought for the recovery of the possession of these premises, and in that ejectment Mrs. Julia Gray was named as a defendant, along with several other persons who it appears were undertenants; but neither of the other two daughters of Bernard Daly were joined as co-defendants.

It also appears that since the death of Mr. Gray the property was managed partly by Mr. M'Donnell and partly by Mr. O'Loughlen the attorney for Mrs. Gray in the present action; and that the arrears of rent for which that ejectment was brought were paid either by M'Donnell or O'Loughlen, and the premises redeemed. Both of these gentlemen were examined at the trial as witnesses for the plaintiff, and the object of their examination was to show that the defendant Mrs. Gray and no one else

was in possession of, and exercised acts of ownership over, this property. I do not go in detail into this evidence, as the result of it is stated by my Brother CHRISTIAN, in his report; he says it was evident to every one in Court that Mr. O'Loughlen was an unwilling witness, and that notwithstanding his unwillingness to give evidence, neither the Judge nor the jury entertained a shadow of a doubt that he managed and acted altogether on the part of the defendant, but that, being her attorney, he would not give any evidence against her that he could avoid. Therefore we must take it on the evidence, that, from the death of the widow, Mr. and Mrs. Gray, and from the death of Mr. Gray, that Mrs. Gray, the defendant, alone, had been in possession of this property; that she alone had paid and received rent in respect of it. It does not appear on the evidence what has become of the other two daughters; it was stated by Mr. *Blake*, during the argument, and in his certificate, that they had become nuns and were at present in a convent in Sligo; but no evidence was given to that effect, and it must now be taken that no account was given of them. The only other matter to which I may call attention, and which appears to me conclusive evidence that the defendant was then absolute owner of this property, is a letter of the 14th of June 1860, written by her to the plaintiff, in which she describes herself as representative of her father, and applies to him for a renewal of the lease as being such representative. It is plain, from reading this letter, that this lady there represented herself to the plaintiff as being the person entitled to the lease in question; she makes no allusion to her two sisters as joint owners with her of this property, she asks for the renewal for herself alone, and she says that unless she obtains it her circumstances are such that she will be obliged to leave the premises out of repair. From the year 1859, therefore, it may be taken that the defendant was in possession of the demised premises, that she was paying rent for them to her landlord, and receiving rent from the undertenants; being accepted by the landlord as his tenant and acknowledged by him as such, by his bringing an ejectment against her for

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non-payment of rent: and we have then the letter of the 14th of June 1860, in which she represented herself to him as owner of this lease, and as solely responsible for the rent and performance of the covenants. I may here observe that the old rule of law was, that the possession of one joint tenant was the possession of all, and so of coparceners and tenants in common; but it may be doubted whether any such rule now exists: it certainly does not, so far as the Statute of Limitations is concerned. It was not controverted by the defendant's Counsel that, if there was only the first count in this declaration, she would be liable on the covenant as assignee of this lease; that the several possession by her, the payment and receipt of rent, and those other matters which I have stated, would be ample *prima facie* evidence, if uncontradicted and unexplained, to show that she was assignee; and looking at her letter of the 14th of June 1860, I would say it would require a strong case on her part to show that what she represented to her landlord in that letter was not the fact.

But the case made by the defendant's Counsel at the trial was this, that, as the plaintiff was not satisfied with relying on his first count, but proceeded in his second count to trace the derivation of the defendant's title to these premises as assignee, he was bound to prove every step in that title, and as one of those steps to show that the defendant's mother did in fact appoint or give the premises to her in the manner stated in that count. So far as I am aware, no case has been cited establishing this proposition, that if a party has two counts in his declaration, and at the trial fails to establish one, he is precluded from recovering on the other which the evidence is sufficient to support.

The contention here is that, because the plaintiff went out of his way to state this long devolution of title, although he proved that a will was in point of fact made by Bernard Daly the lessee, and showed possession under that will, and showed also exclusive possession by this lady, that was no evidence on which the jury might presume that an appointment had been made to her. During the argument, several cases were cited to show how little evidence would be sufficient to entitle a jury to presume an assignment of

a leasehold interest as against a party in possession; and I may refer to the case of *Doe d. Morris v. Williams* (a).—[His Lordship stated the facts of that case.]—There was no evidence in that case that the landlord had ever recognised Williams as his tenant or that Williams had ever recognised Morris as his landlord; there had been no payment of rent, nothing but the mere circumstance of possession unaccounted for; and the Court there refused a rule to enter a nonsuit, and held that the ruling of the learned Judge at the trial was right, and that the mere possession was ample evidence upon which a jury might act, although, as we all know, under the Statute of Frauds a chattel interest in land cannot be assigned without writing. We were referred to the case of *Doe d. Batten v. Murless* (b), which is an important authority, for this reason, that the plaintiff did not content himself with mere evidence of possession, but gave in evidence several documents showing how the defendant had become assignee. The ejectment in that case was brought by a person who had purchased the defendant's interest in a term which had been sold by the Sheriff under an execution; and in order to prove that defendant had a chattel interest in the premises which could be sold under a *fi. fa.*, the plaintiff produced a lease to the defendant's father, and he then proceeded to show that the father made a will, and under that will that the term was vested in the defendant's elder brother, who had taken out administration to his father; the elder brother had died, and to show that the defendant was representative of his brother, the plaintiff produced a deed whereby the defendant had assigned the equity of redemption in other premises to a third party, and in which deed it was recited that he was the legal personal representative of his brother; he had been in possession since the death of his brother, but except that recital no evidence was given that he was his brother's representative. Now that was a case where the party was making title to a leasehold interest; and the Court held that, having shown that the term was in existence and the party in possession, they would presume the possession was lawful; and that as the defendant

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(a) 6 B. & Cr. 41.

(b) 6 M. & Sel. 110.

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had represented himself as representative of his brother, the Court would presume, as against him, that he was not only representative of his brother, but also administrator *de bonis non* of his father.

It appears to me that the principle of that case is applicable to the present, and that the circumstance of the party attempting by specific evidence to deduce the title of the assignee, does not render it imperative on him to deduce every step of that title; and that the evidence which I have stated was amply sufficient to show that the defendant was assignee of the lease in question; though, from the evidence given by the plaintiff, she could under the circumstances be assignee only by an appointment executed by her mother, or an assignment executed by her sisters.

Since the argument, I have accidentally met with a case in *Batty's Reports*, which appears to me to have some bearing on the question, namely, *Dowell v. Dignan* (a), which was an action of covenant for rent. The allegation in the second count was, just as in the first count here, that all the estate and interest of the lessee by assignment thereof came to and vested in the defendant; there was then another count setting out the lease, and stating that the lessee died seised, leaving the defendant his heir-at-law, and that he entered into, and became seised and possessed of the demised premises as special occupant. The lease was to Dignan, the lessee, his heirs, executors and administrators, for one life or twenty-one years, and the life was still in existence, and it was contended that the defendant was liable to the rent, as special occupant. The case was tried in Galway. In order to sustain his case, the plaintiff proved the death of the lessee; and he attempted to prove that the defendant, who was the lessee's elder brother, had entered into possession; but in that he failed, for it appeared that a younger brother of the lessee had entered into possession of the demised premises, and occupied them from the death of the lessee. Two questions were left to the jury by Mr. Justice Vandeleur—first, whether the defendant had ever entered into possession of the demised premises; and the jury found that he never had, nor claimed or exercised any ownership over them. Upon the second

(a) *Batty*, 698.

question, whether the plaintiff had accepted the younger brother as his tenant, the jury found he had done so. In that state of facts, how was the judgment to be entered above? We have an elaborate judgment of Bushe, C. J., in which he holds that, though heir of his brother, and special occupant, until the defendant did some act showing his acceptance of the lease, he was not liable for the rent. Now, upon that authority, what would the position of the plaintiff be here, if he had brought this action against the defendant and her two sisters, and the latter proved that since the death of their father they had never entered or put forward any claim to these premises, that the present defendant had alone been in possession, and treated as tenant by the plaintiff? If I take a right view of that case of *Dowell v. Dignan* (a), I would ask how could the plaintiff have sustained an action against these three ladies? It occurs to us, that there was not only evidence to be submitted to the jury at the trial, but that there was clear evidence that the defendant was owner of the whole of this property; even though, for that purpose, it was necessary to assume that the defendant's mother had executed an appointment, giving to her the interest in the farm in question.

But there is another view of this case which, I may say for myself, has obtained my most anxious consideration, namely, whether there was a question to be submitted to the jury at all, and whether, even supposing the defendant was tenant in common of these lands along with her two sisters, it was open to her to raise such a defence on the pleadings as they stand in relation to the first count, and whether she should not have pleaded in abatement the non-joinder of her two sisters? Now, on that part of the case it is necessary to recur to some elementary principles. The general rule is, that if one of several co-contractors be sued, he cannot plead that he did not contract—as he did in fact contract, though jointly, with others; and he can avail himself of the non-joinder of the other co-contractors only by plea in abatement: and the same rule applies to actions with respect to real property. In *Wilkinson v. Haygarth* (b), which was an action of trespass for breaking and entering the plaintiff's close, and cutting turf, the defendant pleaded that the close was not

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(a) *Ubi supra*.

(b) 12 Q. B. 849.

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the plaintiff's; and to support that plea, he gave evidence to show that the plaintiff was tenant in common of the close in question along with another person, under whose authority the defendant acted; and it was held that was only the subject-matter of a plea in abatement, and could not be pleaded in bar: and Lord Denman says, at page 850:—"If the defendant thinks he can have any advantage from the joint interest of another, he must plead it in abatement." The case of *Merceron v. Dowson* (a) is an important decision on this branch of the case.—[His Lordship here stated the facts of the case.]—Now, the substance of the plea in that case, which was a plea in bar, was precisely the same as the ground of defence relied on in evidence in the present case, namely, that the defendant, who was sued as assignee, was in possession as tenant in common along with others. That plea was demurred to; and it was contended in argument, on the authority of the case of *Hare v. Cator* (b), that it was a good plea in bar. In *Hare v. Cator*, the defendant was charged as assignee of the whole; and the plaintiff, having only shown him to be assignee of a part, was nonsuited. The difference between the cases of *Merceron v. Dowson* and *Hare v. Cator* is this—in the latter case the defendant was assignee of a part only, while in the former he was tenant in common of the whole. And Bayley, J., in giving judgment in *Merceron v. Dowson*, after stating that he had no doubt that the plea was bad, says:—"The plea is not that the defendant is liable to sustain a part only of a joint liability, but that he is not liable at all. That is a plea in bar, and I think clearly bad. It should have been that the defendant was not liable to the whole burden in the manner charged. He should have pointed out the other persons liable; and then the plaintiff might have been compelled to include them in his declaration." In other words, that it was the subject-matter of a plea in abatement. And in the report of the case, in 8 Dowl. & RyL., at page 268, the same learned Judge is reported to have said:—"His (the defendant's) only ground of objection is, that he is charged singly, whereas he ought to

(a) 5 B. & Cr. 479; S. C., 8 Dowl. & RyL. 264.

(b) Cowp. 766.

"have been charged jointly with others; and that was matter E. T. 1864.
 "which should have been pleaded in abatement, and not in bar." *Common Pleas.*

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The next case is that of *Curtis v. Spitty* (a), in which the question was, whether in an action of debt for rent against a party sued as assignee, evidence that the defendant was assignee of part only of the premises would sustain an allegation in the declaration that he was assignee of the whole, and to which allegation a traverse had been pleaded by the defendant. It was held there that the evidence did not support the allegation; but that was on the ground that the defendant had not an undivided interest in the entire, but the entire interest in a divided part. That case was decided on the authority of *Hare v. Cator*; and it would appear to me, on reading the report of the case, that the Judges entertained some doubt as to the propriety of the decision in *Hare v. Cator*. I do not mean to question the authority of that case; but the observations of the Judges in *Curtis v. Spitty* suggest that if the case of *Hare v. Cator* came before the Court again, the case would require reconsideration. But, however that may be, it is enough to say that the case of *Curtis v. Spitty* is no authority for the present case. The decision in that case went altogether on the ground that the defendant was assignee of the entire interest in part of the premises. But let us see how these cases have been acted on, and what the rule has been considered to be at Westminster, as to the course to be taken where one of several joint tenants or tenants in common is sued, leaving out the others. We have been referred to the case of *Heap v. Livingston* (b), which was an action of covenant against the defendants as assignees of a lease, and the defendants pleaded in abatement that they were joint assignees of the premises along with another person, B, who was not named a defendant. A demurrer was taken to the form of the plea, on the ground that the defendant should have stated more accurately the way in which B became assignee jointly with them. It was argued that the plea, if not a good plea in abatement, was a good plea in bar; and Parke, B., says, at page 899:—"In this case, the

(a) 1 Bing. N. C. 756.

(b) 11 M. & W. 896.

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 "demurrer is, that the plea does not state his title specially. We
 "are of opinion that this objection is good." And in another part
 of his judgment he says:—"It was argued by the defendant's
 "Counsel that this was properly a plea in bar, and was good in
 "substance; and if it was so, the defendant might avail himself
 "of it, there being no special demurrer on the ground that it was
 "an argumentative traverse of the averment that all the estate
 "vested in the defendant by assignment." Then, after referring
 to the cases of *Hare v. Cator*, *Curtis v. Spitty*, and *Merceron v.*
Dowson, he proceeds:—"But in this case the defendant does not
 "take *part* of the estate, he is seised *per my et per tout* in the
 "whole, and the cases cited do not apply. His plea is properly
 "pleaded in abatement, but, for the reason before given, is bad in
 "form." In other words, that it was not a plea in bar, but a plea
 in abatement, but that from some informality in the way it was
 pleaded, it was bad.

In the *note* to the case of *Devereux v. Barlow*, in the last
 edition of *Saunders's Reports*, p. 182, the very learned Editors,
 after referring to these several cases to which I have referred,
 state the law to be, that if one of several joint tenants or tenants
 in common of a leasehold interest is sued as assignee of the entire
 interest, he cannot plead in bar that he is not assignee of the entire
 interest, as in fact he is so, though jointly with others; but must
 plead the nonjoinder of co-tenants in abatement. Of course the
 opinions of these very learned persons is not an actual authority,
 but I think clearly shows the opinion of the Profession on the
 subject.

To state shortly the conclusion to which the majority of the
 Court have come, we are of opinion that the evidence given
 at the trial was amply sufficient to sustain the first count, even
 though it were necessary to come to the conclusion that all the
 estate and interest of the lessee Bernard Daly was vested in the
 defendant solely, and not merely as tenant in common with others;
 and that the fact of the summons and plaint containing the second

count should not have precluded the plaintiff from relying at the trial on the first count. Individually I am of opinion that the evidence at the trial was also sufficient to sustain the second count; and, lastly, the majority of the Court are of opinion, that even though the defendant was only tenant in common with her sisters of the estate under the lease, that such a defence was not open to her under the plea to the first count, and that she could have availed herself of such a defence only by plea in abatement or some such proceeding under the Common Law Procedure Act.

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This being our opinion, it would be idle merely to set aside the verdict and grant a new trial; our rule will be, to enter a verdict for the plaintiff in pursuance of the leave reserved at the trial, we being at liberty to draw such inferences as the jury ought; but as we are deciding against the opinion of the Judge at the trial, we are of opinion that the parties should bear their own costs of this motion.

CHRISTIAN, J.

Of the two questions which have been discussed in this case one appears to me to be of no small practical importance, in connection with a subject that frequently presents itself of late years, and which is, I fear, if not better understood, more consistently acted upon in England than here. I mean the proper division of responsibility between the Judge and Jury at *Nisi Prius*. The question which touches upon that subject is, I need hardly say, the principal question in the case: it is the one which was raised at the trial, on which liberty to move was then saved, and on which the conditional order was taken; and it is this, assuming that it was indispensable for the maintaining of the issue, which lay on the plaintiff, to prove that the defendant was solely seised of the entire of the lessee's interest under the lease, did the evidence which he presented constitute such a case in support of that issue, as he had a right to have left to the jury? That question I now proceed to consider. I shall afterwards say a few words on the other point, which proceeded from a Member of the Court during the argument, namely, admitting that the defendant was only a tenant

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It was contended by the plaintiff's Counsel that his position at the trial, as regards the obligation of proof, was different under the first count of the plaint, the general one, from what it was under the second, the special one. In my opinion all difference in this respect was effaced by the course pursued in proof at the trial. When the plaintiff gave in evidence the will of Bernard Daly, proved the death of that testator, leaving his wife and three daughters, of whom the defendant was one; proved the death of the widow, who under the will had the whole interest in her during her lifetime; he established that, upon the happening of the latter event, the defendant and her two sisters became tenants in common of the leasehold; that is to say, the defendant became seised of an undivided one-third, but had no estate or interest at all in the other two-thirds: in other words, he put himself out of Court, both upon the one count and the other, unless he could go a step a further, and give proof of the act by which those other two-thirds also became vested in the defendant. In one or other of two modes only could that be effected, viz., either by proof of an exercise by the widow of the power in the will, as averred in the special count, or by proof of a conveyance to the defendant from her sisters. The latter was not suggested either in pleading or in statement; the other was the plaintiff's case; and the question at the trial was, and the question now is, did he give any legal evidence proper for the consideration of a jury of an execution of the power? It was suggested in argument here that the plaintiff was not confined to that method of proving a sole seisin, but was entitled to have it left to the jury to presume that the lessee had, by conveyance in his lifetime, given the whole to the defendant alone. In my opinion no weight whatever is due to that argument. When the plaintiff made the will of Bernard Daly a part of the case by which he sought to trace the lessee's interest to the defendant, he obviously precluded himself from asking for the utterly inconsistent presumption that the same testator had, by an act *inter vivos*, parted with his whole estate;

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in other words, that the will was, as to these premises, a mere nullity. He was bound to complete in proof the chain of title which he came with a foreknowledge of, which he stated as his case, and which he proved in part. The rule of law on this subject is thus stated in a book of authority on evidence—2 *Phillips's Evidence* (7th ed.), p. 150:—"When the action is brought against the defendant as assignee of the term, and the issue is on the assignment, it will be enough for the plaintiff to give general evidence, from which an assignment may be inferred; as that the defendant is in possession of the demised premises, or has paid rent. Payment of rent by the defendant to the plaintiff, when the defendant has been let into possession by the original lessee, is *prima facie* evidence of the assignment of the whole term. If, however, the plaintiff states the particulars of the defendant's title, he must prove them as laid." For the last proposition Mr. *Phillips* cites a passage from the judgment of Lord Alvanley, in *Turner v. Eyles* (a):—"We all know that if a party derive his right of action against the debtor, through a variety of deeds, instead of charging him generally by virtue of divers mesne assignments, he must prove the deeds as stated." Now, that passage does not refer merely to the case of a party deriving his right of action in pleading, but applies equally to such a derivation made at the trial in statement and in proof. The reason of the rule is this—if the landlord is ignorant of the derivation of the lessee's title, if all he knows is that there is a certain person in possession, apparently assuming the rights and duties of the lessee, the law allows him to rest on that as *prima facie* evidence of assignment, and throws on the defendant the burden of rebutting it if he can, by showing the true state of the title; but, if the landlord knows beforehand the true state of the title, the whole reason of this departure from the ordinary rule of evidence ceases. The object of the exception is to relieve the landlord from the *impossibility*, in which an utter ignorance of the title places him, not to excuse him from *neglect* in not resorting to the proper method of arming himself with proof of

(a) 2 Bos. & Pul. 461.

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a title, every step of which he knows. No case has been cited, and I believe none exists in which, in an action of this kind, a landlord, having full foreknowledge of the deduction of title under the lease, having pleaded it and stated it, and proved it step by step up to one particular instrument of conveyance, that, as to this particular instrument, he is under any exemption whatever from the ordinary requirements of proof.

What then was the requirement of proof under which the plaintiff in this case lay at the trial? He proved the deduction of title up to a certain point, at which, if he had left it, it would have been disproof, not proof, of the issue which lay upon him. One step more was necessary to convert this disproof into proof, viz., a due exercise by Mrs. Julia Daly of the power in her husband's will. By this will, this testator, after two pecuniary legacies, willed and bequeathed "the remainder of all my property which I die worth, including "freehold and personal, to my fond and beloved wife Julia Daly, "during her natural life; and my wish is that, at her death, she "will divide any amount of said property which she is worth, share "and share alike, to the survivor or survivors of them my said three "daughters." There is no doubt that under that will the three daughters became tenants in common in remainder after their mother's life estate of all the testator's property, and of each item of it, including the leasehold in question, subject to a power in the mother to alter the distribution of it amongst them as she pleased: under which power she might undoubtedly have given other property, real or personal, if there was any such, to the other two daughters, and this leasehold to Mrs. Gray solely. There is a serious question upon the will, whether the widow had not an unlimited power of expenditure during her lifetime, and whether the subject of the daughters' remainder, and of the power of distribution, was not whatever portion only of the property should be remaining at the widow's decease. The words are, "at her death she will divide any amount of said property which she is worth." Now, to a due execution of this power, in the way of divesting the sisters of two-thirds of the leasehold, and giving the whole to Mrs. Gray, two things were obviously necessary—first, that there

was other property out of which to provide for the sisters; secondly, that the power was in fact exercised by making such a distribution. The special count avers that the widow divided the property, by giving to Mrs. Gray the lands, and giving to the others other portions of the property. The defence traverses that any such division or giving took place. Now, there is not a particle of evidence that Bernard Daly left any property whatever except these lands; still less that any other was remaining at the widow's death; and without the former, at all events, and I am disposed to think without the latter, Mrs. Daly would have no power to give the whole leasehold to the defendants. Such an exercise of the power would be simply void. There is the first defect in the plaintiff's proof. Not a particle of evidence was given that the facts ever existed, which alone would warrant such an exercise of this power, as it lay on the plaintiff to prove. But, suppose that defect removed; the next step essential was, to prove that the power had been in fact exercised. How was that to be proved? It was argued at the trial that, under the terms of the power, a mere division of the property without writing would have been sufficient. That however was abandoned during the argument here; and it was admitted that a deed or will, or, at the lowest, a writing of some kind, was necessary. The plaintiff had therefore to give proof of the existence and contents of that writing. How was he to do that? It was not of course in his possession; but the ordinary methods of having it forthcoming for proof were open to him. He well knew the quarters in one or other of which, if it existed, it must be found. It would be a very modern instrument; it could not have existed prior to October 1852, and could not be an operative document before March 1859. It must have been (if it existed) in the possession, power or procurement of the defendant, or of one of her sisters, being the title-deed of all to their shares of their father's property. The plaintiff knew this from the commencement of his action. He might have compelled its production by the common method of *subpœna duces tecum* upon the defendant and her two sisters; and he might have insured it (if the defendant had it) by exhibiting interrogatories to her under the Common Law Procedure Act; and when she

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admitted possession of it, moving for its production. These are the ordinary measures which a suitor must take to bring forward a document which is not his, but is necessary for proof of his case: and if these measures fail, the consequence is, that he fails in his proof, and must take his remedy against those who have disobeyed the *subpœna duces tecum*, unless he can prove that the defendant was the person who had the document; when he may, after notice to produce, give secondary evidence of its contents. Not one of these precautions was taken in the present case. Even a notice to produce the instrument was not proved to have been given to the defendant. Mr. *Blake* says that a general notice to produce all documents was annexed to his brief at the trial, and that it must therefore be presumed that it was served. I do not think that follows; but this is certain, that on my notes of the trial it does not appear that any notice of the kind was offered, or (which is more material, for the notice might possibly have been proved, if the want of it were objected to) that any deed or document at all was called for from the defendant or her attorney. In short, without one single effort to procure the document, the plaintiff relied for proof of its existence and contents, on what? A presumption to be deduced from the acts of the defendant dealing with the possession for a period of four years. Now, assume that these acts of possession had been perfectly unequivocal, that they showed not only possession by the defendant, but exclusion of her sisters, I wish to know whether, according to the law of evidence, an instrument of title to real estate can be proved in that way? Remember that, if the Judge sent this question of presumption to the jury, what he should tell them is, that they must be satisfied that such an instrument was in fact executed; they must affirm on their oaths that it did in fact and reality exist. It is not like the case of easements before the Prescription Act, in which the Judge should tell the jury that, from twenty years' enjoyment, they must presume a grant, even although they did not believe it ever existed, as held by the Exchequer Chamber, in *Linehan v. Deeble*, where the judgment of this Court was reversed. In a case like the present, the jury must find as a fact the existence and contents of the deed. Now, before the

present case, was it ever contended or thought of that such a presumption could be founded upon four years' possession; the instrument being a modern one; its depositories known and accessible, and not the slightest step taken to obtain its production? Why you are opening quite a new chapter in the law of evidence. I know of no case in the books in which it was even suggested that mere possession, unaided by other circumstances, if for less than twenty years, could found the presumption of a deed; and still less that it could dispense with all the ordinary measures for procuring the document itself.

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Hitherto I have been assuming that the proof was of acts unequivocal, showing a possession sole and exclusive; short of that they would obviously be of no avail. If they were as consistent with the non-existence as with the existence of an instrument destroying the tenancy in common, the proof was nought. But the duty of determining what their character was in that respect lay with the Judge, not the jury. This is the aspect in which this case assumes a character of importance. There is hardly a number of the modern English Reports, as they come over, in which we do not find enforced or recognised, the rule now firmly established, that a Judge does not discharge his duty merely by seeing that each separate piece of evidence as it is offered is *per se* legally admissible, and then casting on the jury the whole responsibility. The Judge must estimate the case in proof as a whole, and determine whether there is a sufficient case to be submitted to the jury. A safe rule laid down for his guidance in discharging that duty is this, that if the evidence offered by the party on whom the affirmative of the issue lies be as consistent with the negative as it is with the affirmative, it is the Judge's duty to interfere, and to withhold that case from the jury. In *Wheelton v. Hardisty* (a), Erle, J., delivering the judgment of himself and of Wightman and Crompton, JJ., says:—"Modern cases have established that where the party on whom the onus lies of proving an allegation gives evidence as consistent with one view of the case as the other, he fails in his proof;" and in *M'Mahon v. Leonard* (b), Wightman, J.,

(a) 8 Ell. & Bl. 263.

(b) 6 H. of L. Cas. 993.

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conveying the opinion of the Judges to the House of Lords, says:—"The onus is on the party offering the evidence; and if "he only offer evidence consistent with either supposition or "fact, he is not entitled to have it put to the jury."

The question then is, did the plaintiff's evidence come up to the standard thus prescribed? What was it? Mrs. Daly, the testator's widow, was during her lifetime in possession of the whole, as tenant for life under her husband's will; she resided on the premises: one of her three daughters, Mrs. Gray the defendant, together with her husband, resided with her; she died in March 1859. The defendant and her two sisters thereupon became tenants in common, entitled as such to the possession; Mrs. Gray and her husband continued residing on the premises until his death in 1859. The acts relied on in evidence by the plaintiff, as done by her during the four years between her mother's death and the commencement of this action, were some in parol merely and some in writing. The former were to this effect:—the defendant and her husband, while he lived, and she alone after his death managed the property and farmed the lands; she, through the instrumentality of Mr. Edward O'Loughlen, authorised a Mr. Martin M'Donnell, during some two years or thereabouts, to collect the rents and to let the grazing; and whatever he received he paid over to Mr. O'Loughlen. There is no evidence whatever, positive or negative, as to the other two tenants in common; what they were, where they were, what they were doing; that they were in enjoyment of any other portions of their father's property, or that there was any such other property at all. Now if this were all, let me ask whether these acts which I have stated are such that, in order to account for them, we are driven to the presumption of some instrument by which Mrs. Gray's tenancy in common with her sisters was turned into a sole tenancy in herself? Why they are precisely the very acts which, so far as the evidence goes (falling short as it does of exclusion), a tenant in common has a right to do. It seems to have been overlooked that each tenant in common is, before partition, entitled to the possession of the whole. That is the one unity which exists between tenants in common, as distinguished from joint tenants. The latter

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are seized *per tout* and possessed *per tout*; the former are possessed *per tout*, whilst their *seisin* is as separate as that of owners of divided parts. How then do you advance yourself towards the proof that a tenancy in common has been destroyed, by giving evidence of acts which are in exact conformity with a tenant in common's right? But two documents are in evidence, which the plaintiff greatly relies on. They are a letter from Mrs. Gray to the plaintiff asking for a renewal, and a judgment in ejectment for non-payment of rent, from which she redeemed the premises. Now so far as these are *acts*, *i. e.*, the act of asking a renewal or the act of redeeming, the observations I have already made are obviously applicable; for a tenant in common might just as naturally be expected to ask for a renewal and to save the premises from eviction, as a tenant in severalty. It was said however that the terms of these documents were such as to amount to an *admission* or assertion by the defendant that she was solely entitled. Now before I examine the documents, in order to see if there is any foundation for that, I must make this observation, that here again we seem to be in some danger in this case of making formidable innovations on the rules of evidence. The thing to be proved by the plaintiff was, as I have already shown, a deed or other instrument of conveyance by which the title to real estate was changed. We all know the case of *Slatterie v. Pooley* (a), in which the Court of Exchequer held that an admission by a party of the contents of a deed is admissible in evidence against him, as proof of the deed, without producing the deed or accounting for its absence. This case was strongly disapproved of by the Court of Queen's Bench here, in *Lawless v. Queale* (b). It is severely criticised in *Taylor on Evidence*, s. 382, p. 372, 3rd ed., whilst on the other hand it is approved of by Mr. *Best*, in his work. The doctrine can therefore scarcely be considered as being yet quite established. But it would be going enormously beyond *Slatterie v. Pooley* to say, that when what is given in evidence as an admission contains no reference whatever to any deed, but merely contains something from which some implication may

(a) 6 M. & W. 664.
VOL. 15.(b) 8 Ir. Law Rep. 385.
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be deduced, of what would be the legal effect of such a deed, if it existed, that that is not only to be received as evidence of the deed and its contents, but evidence dispensing with all necessity for taking the slightest step to procure the deed itself. That I say would be going enormously beyond anything that has yet been done, and would be innovating dangerously upon established laws of proof. But turn now to the documents, and see whether there is anything in their terms more inconsistent with a continuing tenancy in common than were, as I have shown, the acts of which these writings were but the accompaniments. In the letter, Mrs. Gray speaks in her own name only, and does not mention her sisters; "as representative of my father," she says, "I beg to apply for a renewal." But these words must be taken with reference to the matter in hand; the matter in hand was, to apply for a renewal. Well, for that purpose each tenant in common represented the right of the original lessee: each claiming under him had a right to ask for a renewal; and it was not until the lease came to be prepared that the names of the others need be brought forward. There is not a word in the letter which, having regard to the purpose and the occasion, a tenant in common might not use. As to the plaint in ejectment, it is simply futile to found anything on its language; Mrs. Gray, and some thirteen other persons, are named as defendants in it, and served. The singular and the plural, "defendant and defendants," are used promiscuously throughout, whether by error in the copy or the original I know not. Be the language what it may, it is not hers: she never saw it; she never took defence to it; and the single act which connects her with the document is that, after judgment by default, Mr. O'Loughlen (we may assume by her authority) redeemed the premises from eviction. To argue that the language of this plaint is any evidence of an admission by her that she alone was then the tenant is simply absurd. The true significancy in the case of the letter and of the plaint is, as part and parcel of the acts which they accompanied, and which were, the one, an effort to prolong the interest by renewal, the other, a preservation of it from extinction by eviction; both of which are

such as a tenant in common might be expected to do. Thus, then, stands the evidence; Mrs. Gray managed the property, farmed the land, authorised M'Donnell to manage, applied for a renewal and redeemed the premises from eviction. There is the whole case of the plaintiff. But these acts are every one of them in exact and entire accordance with her right and her interest as a tenant in common. How then do they found a presumption that she had ceased to be a tenant in common? If indeed they had been accompanied by any circumstances showing *exclusion* of the co-tenants, such as would constitute an *ouster*, there might be some foundation for the plaintiff's argument; for there would then be a negation of the tenancy in common. But there is not a trace of anything of the kind. There is not an act of the defendants in proof which was in excess of the right which the law gives to each tenant in common, each being entitled to the possession of the whole. A good test to try it by is this:—suppose Mrs. Gray's two sisters brought an ejectment against her, and that she filed her defence under the 210th section of the Common Law Procedure Act (1853), stating that she was in possession as tenant in common, and admitted the plaintiff's right to two undivided thirds, but denied an actual *ouster*: if the plaintiffs went on with their ejectment they must prove an actual *ouster* or be defeated. Well, suppose they gave merely the evidence which we have here, would the Judge be justified in leaving the question of *ouster* to the jury? Most clearly not, inasmuch as the acts were not inconsistent with the rights of the other tenants: and if for that reason they would not be evidence of an *ouster*, how *a fortiori* can they be evidence on which to found a presumption that the tenancy in common was destroyed by a deed. This case is one of the clearest I have seen for the application of the rule laid down by the authorities I have referred to; the plaintiff's evidence was as consistent with the negative as with the affirmative of the issue which lay on him; and therefore it was the Judge's duty to withhold it from the jury. It was said that the defendant herself might have been examined in proof of her defence. The answer is this, her case was simply a negative,

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Upon the whole then, my view of the first point is this, that as the plaintiff, when he brought his action, knew the true title, stated it in his pleading, and undertook it in his proof, he was bound to prove it by the ordinary modes of evidence; that the proof he gave stopped at a certain point which constituted it disproof, not proof, of the issue; and that the case which he presented to supply the missing link was insufficient in four particulars; first, because the power was not shown to have ever arisen, no proof of other property having been given; secondly, because no effort was made to procure the instrument by which the power must have been exercised, if it did arise and if it was exercised; thirdly, because four years of possession, even if proved to be exclusive, is not in law a case on which to found the presumption of a deed; fourthly, because, if it were, the possession proved here was not exclusive, but was as consistent with the non-existence as with the existence of the deed. And having given to the case the most careful consideration, I am bound to say that my opinion is, that to have left the issue to the jury, on the plaintiff's evidence, would have been simply to shift off upon them the responsibility which was my own.

That is my opinion upon the question which was made at the trial, on which plaintiff's Counsel asked the Judge to reserve leave to move, and on which he took his conditional order. I have now however to consider the other point, which was taken up by Counsel on a suggestion from my LORD CHIEF JUSTICE during the argument. The plaintiff's Counsel now say that all they did at the trial was a mistake. The question they called on the Judge to leave to the jury was an immaterial question—the evidence of possession in the defendant was all immaterial evidence; they were entitled to ask the Judge directly they had proved the will of Bernard Daly, his death and that of his widow, to tell the jury that in law and fact the issue on the first count of the plaint was proved. I do not think it worth while to stop to consider whether, with any regard to form and regularity of

procedure, a plaintiff can thus be permitted to shift his ground. The objection might have been raised by demurrer to the defences. He did not choose to demur. He might have presented it to the Judge at the trial, and called for a direction on it. He did not do that. He rested his case exclusively upon another ground, which involved the direct negative of his present contention, and on that ground asked the Judge to send the case to the jury; and on his refusal to do so, took leave from him to move, and on that leave obtained his conditional order. I know no case in which a verdict has been set aside on a ground utterly repugnant to the case made at the trial. But it is not worth while to dwell on that, I prefer to consider what the value of the point would have been if it had been made at the trial. The first count of the plaint contains the following averment:—that after the making of the lease “ALL the estate, right, title and interest, and term of years then to come and unexpired, property, profit, claim and demand whatsoever, of him the said Bernard Daly, in and to the demised premises, by assignment, legally came to and vested in the defendant.” That averment was traversed, and an issue settled upon it; and the question is now, whether that averment was proved by proving that all the estate, right, title and interest, &c., in one undivided third came to the defendant; whilst all the estate, right, title and interest in the other undivided two-thirds were in two other persons. The proposition sounds like a mere solecism in language; but nevertheless it is what I have stated.

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The law on this subject is comprised within the limits of three decisions and a *dictum*. The earliest, *Hare v. Cator* (a), it is unnecessary to consider, as that case may now be said to be absorbed into the later and similar case of *Curtis v. Spitty* (b). The first case therefore which it is necessary to refer to is *Merceron v. Dowson* (c); and that is the sole decision on which the plaintiff rests his contention. Now that case does not present the question at all in the aspect in which it is presented here, *i. e.*, as a question

(a) *Ubi supra*.

(b) *Ubi supra*.

(c) *Ubi supra*.

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of variance between an issue in fact and the proof. That case was on demurrer to one of the pleas. The landlord there was totally ignorant of the derivation of the lessee's title; and accordingly he availed himself of the general form of declaration, averring that all the estate and interest came to the defendant. To this the defendant pleaded, first, *non est factum*: secondly, that all the interest did not come as alleged: and issue was taken on those. Now if that had been all, and the case had gone to trial on the latter plea, you would then have had this very case; and the question would then have arisen, whether, under the terms of that issue, the plaintiff would not have been put out of Court the moment it was proved that the defendant was assignee only of an undivided part. But the defendant pleaded a third plea, by which he said, in substance, that he was in possession as tenant in common with three others, but had no greater interest. That plea was demurred to; and it is the decision on that demurrer that is reported in 5 *Barnewall and Creswell*. Well, the demurrer was allowed. On what ground? The very trite and obvious one, that the plea was pleaded in bar to the whole cause of action, whereas it was only an answer to part. The defendant, as one of the tenants in common, was liable to a proportion of the dilapidations, and the plea was no answer to this proportion at all. He should have pleaded in abatement the non-joinder of the co-tenants, of whose existence the landlord was ignorant; and the landlord would be obliged to amend his declaration by adding them as parties. There were other objections to the plea; such as that it did not admit any assignment at all, but only possession, and was therefore neither a denial nor a confession and avoidance. That special plea was plainly bad; but the decision on that demurrer is no authority whatever as to how the case would have fared had it gone to trial merely on the issue upon the second plea. But that is what we want an authority for here, and therefore *Merceron v. Dowson*, as a decision, is of no value to the plaintiff, whatever ground it may lay for inferential argument.

But *Curtis v. Spitty* comes much nearer to the point. That was an action for rent, and it differed from *Merceron v. Dowson* in

two particulars; first in the facts; the shares in which the premises in the lease had come to the defendant and the other co-owners were, in *Curtis v. Spitty*, divided shares: secondly, on the pleadings, there was no special plea in *Curtis v. Spitty*. The only plea was a traverse of the averment that "all the estate," &c., came to the defendant. And the plaintiff joined issue on that traverse. The fact appeared in evidence at the trial, and the case came before the Court on a motion by the defendant, pursuant to leave, to enter a verdict for him on the ground of the variance. Now, the argument of the plaintiff's Counsel was this:—this case is precisely the same as *Merceron v. Dowson*. The defendant and another have the whole interest between them; they are together liable for the whole rent; therefore, as was held in *Merceron v. Dowson*, the defendant cannot plead in bar at all, but should plead in abatement, in order that the landlord, who is ignorant of the title, may know who ought to be defendants. Now, if the difference in fact between the two cases, namely, that in one the shares were undivided, in the other divided, were a vital difference, the plaintiff's argument might have been stopped at once. The Court might have said, you cannot rely on *Merceron v. Dowson*, as the facts are essentially different. But what did the Court do? They said, we will not decide at all whether the facts in the case are or are not the same in substance as in *Merceron v. Dowson*: it is not necessary for us to do so; for, assuming that you are right, that divided shares and undivided shares are the same thing for this purpose—that in fact, in merits and in law the cases are identical—the difference in pleading makes the whole difference, and decides the case with the defendant. Now, I confess it appears to me that any one who will calmly consider that case, with a view to understand it, and not with a view to any foregone conclusion, must be satisfied of this, that, if the Judges who decided *Curtis v. Spitty* had *Merceron v. Dowson* before them on the same pleadings as in *Curtis v. Spitty*, they would have decided *Merceron v. Dowson* as they decided *Curtis v. Spitty*. That is perfectly manifest from Chief Justice Tindal's judgment; for he puts *Curtis v. Spitty*, by supposition, into the very predicament of *Merceron v. Dowson*, in

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everything but the pleadings, and then says the pleadings decide the matter in favor of the defendant; the plaintiff should have demurred to the defence, instead of accepting the issue tendered. *Curtis v. Spitty*, therefore, decided on the ground on which it was put, is a decision directly in point in the defendant's favor on this record. Chief Justice Tindal assumed to be of no value whatever the only distinction of fact which exists between *Curtis v. Spitty* and this case, namely, that there the part in which the defendant had no estate was a divided part; here, the parts in which the defendant has no estate are undivided parts. And, unless we are prepared to deny the very organic elements of tenancy in common, I cannot see the possibility of holding that, under the terms of the issue, that difference can be of any value whatever. The issue is, whether *all* the *estate and interest* came; not whether all the possession came. But, in point of *estate and interest*, tenants in common are as several as the owners of different estates; there is only one unity between tenants in common, that of possession. That is the essential difference between joint tenants and tenants in common. Between the former there is unity of estate and title, as well as of possession; each joint tenant has the estate in the whole; he is seised *per tout* as well as possessed *per tout*. But a tenant in common has no estate or interest whatever in anything but his own undivided part. As to the other undivided part, he is, *qua* estate, as complete a stranger as he is to the other lands; the *only* thing he has *in the whole* is possession. *Littleton*, in section 292, defines tenancy in common:—"Tenants in common "are they which have lands or tenements in fee-simple, fee-tail, "or for terme of life, &c., and they have such lands or tenements *by severall titles*, and *not by a joint title*; and none of "them know of this his severall; but they ought by law to occupie "these lands or tenements in common, and *pro indiviso* to take the "profits in common." *Coke*, in his commentary upon that, says:—"And here it appeareth, that the essential difference between joynt-tenants and tenants in common is, that joynttenants have the lands "by one joynt title and in one right, and tenants in common by "severall titles, or by one title and by *severall rights*; which is

"the reason that joyntenants have one joynt freshold, and *tenants in common have severall fresholds*." Mr. Justice *Blackstone*, in the 12th chapter of his second volume, points out that, between joint tenants there are four unities, *interest, title, time and possession*; but that between tenants in common there is only one unity, *possession*. We were referred, a few days ago, in another case, to the reporter's *note*, in 7 *Common Bench Reports*, p. 455, in which he shows the inaccuracy of *Blackstone's* translation of *seisin per my et per tout*, as applied to joint tenants, which *Blackstone* translates, "by the half or moiety, and by all:" whereas the reporter shows that *my*, as here used, means not "moiety" but "nothing;" and that the *seisin* of a joint tenant is of nothing, and of the whole; that is, of nothing separately, but of the whole jointly, according to the passage in *Bracton*—"Quilibet totum tenet, et nihil tenet; scilicet totum in communi et nihil separatim per se." This adds point to what I am upon; the joint tenant is seised of nothing but the whole; the tenant in common of nothing but a part. If, then, according to these authorities, the elementary nature of a tenancy in common is, that one tenant in common has, *qua estate and interest*, simply nothing at all in the shares of the others, what is the difference between this case and *Curtis v. Spitty*? None whatever. If the issue here were, whether all the *possession* came, the difference would be material; because each tenant in common has possession of the whole. But the issue is on *estate and interest*, not on *possession*. It was said, all the estate and interest did come to the defendant with two others; therefore, it was only matter for plea in abatement; therefore, the issue was proved. The very same thing might have been said, and was said, in *Curtis v. Spitty*, for all the estate and interest there did come to the defendant and another. The truth is, that such language is quite incorrect as applied to either case. In neither did all the estate come to all; but in each, part came to one, and other part to others; and it makes not the slightest difference on this issue whether the parts be divided or undivided. To say that an averment that *all* the interest came to A is proved

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These are the decisions which were referred to. I hope I have shown that *Merceron v. Dowson* is no authority for the plaintiff, and that *Hare v. Cator* and *Curtis v. Spitty* are in point for the defendant. But the plaintiff produced a *dictum* of Baron Parke, in *Heap v. Livingston* (a). The decision there was on a special demurrer. The defendant pleaded in abatement that all the estate, &c., came by assignment to him and another, as joint tenants. The cause of demurrer was, for not showing how the assignment was made. Counsel, in support of the plea, attempted to sustain it as an argumentative traverse of the averment that all the estate came to him; and if so, he said *Hare v. Cator* was in point. Baron Parke referred to *Curtis v. Spitty*, as confirming *Hare v. Cator*. The demurrer was allowed on the special ground assigned; but Baron Parke, in giving judgment, referred to the above argument of Counsel, and used the language relied on by the plaintiff:—"The case of *Hare v. Cator* was cited, to which may be added "*Curtis v. Spitty*, where the Court of Common Pleas held that "if the defendant was assignee of part of the land only, he was "entitled to a verdict on the issue, that all the estate did not "vest in him by assignment; contrary to the *dictum* of Mr. Justice "Holroyd, in *Merceron v. Dowson*. But in this case the defendant "does not take part of the estate; he is seised per my et per tout "in the whole; and the cases cited do not apply." And this, it is said, amounts to a *dictum* by Baron Parke, that an issue, such as that in *Curtis v. Spitty*, would be proved by proof of a *tenancy in common*. Now, in the first place, if the passage had that meaning, it would be no more than a *dictum*, which, however eminent the Judge, would not bind the Court, if contrary to principle and decisions. But I deny altogether that the passage has any such meaning. *Heap v. Livingston* was not a case of tenants in common, but of joint tenants, which makes precisely the whole difference; and Baron Parke's language is carefully and accurately suited to the case before him. His reason for saying

(a) *Ubi supra*.

that the case before him would not be ruled by *Curtis v. Spitty* is this—"In this case," he says, "the defendant does not take part of the *estate*; he is seised *per my et per tout* of the whole;" and therefore *Curtis v. Spitty* does not apply. Why that is just the very thing which is true of a joint tenant, but is untrue of a tenant in common. I say that, in this case, to vary Baron Parke's language, "the defendant does take part of the estate, and is not seised *per tout* of the whole." The very fact of such a Judge as Baron Parke so carefully suiting his language to the characteristics of a joint tenancy, strongly suggests that he desired to exclude from what he was saying the case of a tenancy in common. It is material to observe, that when Baron Parke says that *Curtis v. Spitty* is contrary to a *dictum* of Mr. Justice Holroyd, in *Merceron v. Dowson*, he is under a mistake. There is no such *dictum*, nor anything like it, in the report of Mr. Justice Holroyd's judgment. A *note* was referred to in 2 *Wms. Saunders*, p. 181 *d*, note *a*. (not one of Serjeant Williams's *notes*, but a very different thing in point of authority) of the editors of the last edition, in which, professing to give the effect of *Heap v. Livingston*, they give it incorrectly, because they state it as referring to a tenancy in common. I have already shown that it was a case of joint tenancy, and that Baron Parke's language excludes a tenancy in common. That *note* is simply an erroneous representation of a case, given too in language which shows that the writer had not present to his mind at all the essential difference, on the point in question, between the two kinds of tenancy.

Upon the whole, my opinion is, that the point which was *not* made at the trial is no better than the one that *was*, and that, consequently, the defendant ought to retain her verdict.

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WILLIAM BYRNE,
 Administrator of MRS. MARY BYRNE, deceased,

v.

JOHN WILSON.

(*Queen's Bench.*)

June 17, 21.

Action under Lord Campbell's Act. Plaintiff, that defendant undertook to carry one M. B. in a certain omnibus, safely, &c., but by reason of the negligence, &c., of the defendant, said omnibus was precipitated into a lock of a certain canal, and the said M. B. was thereby deprived of existence. Defence:—That said M. B. was not deprived of existence by being precipitated into the said lock, or by any negligence of the defendant, after said omnibus was so precipitated, but by the act of a third person not authorised nor employed by the defendant, nor under his control, who, after said omnibus was so precipitated, wilfully let the water into said canal.

DEMURREE.—The first paragraph of the plaint stated that at the time, &c., the defendant was the proprietor of certain omnibuses plying for hire in Dublin and the vicinity thereof, which plied from Nelson's-pillar to Roundtown, and *vice versa*; that the defendant was a carrier of passengers in those omnibuses on that line of road, and from any place thereon, to such other place thereon as the passengers might desire, for reward to the defendant in that behalf. Averment, that it was the duty of the defendant, as such carrier, with care and skill to conduct said omnibuses while carrying passengers therein, and to have them provided and equipped with all necessary gear and appliances for the safe and secure conduct thereof. And the plaintiff says, that the said Mary Byrne, in her lifetime, became and was received by the defendant as a passenger, to be by him, as such carrier, carried in one of the said omnibuses from Roundtown to Dublin, both of said places being situate on the said line of road, for reward to the defendant. Yet the defendant did not safely and securely carry the said Mary Byrne, in the said omnibus, on the said journey; but, on the contrary thereof, so

Replication:—That the precipitating the said omnibus into the said lock, through the negligence of the defendant, materially contributed to the event whereby, &c.; and the said M. B. would not have been deprived of existence, except for such precipitation. Demurrer thereto.

Held, that, although the death of M. B. was not caused immediately by the act of the defendant, it was such a consequential result of that act as entitled her representative to maintain an action.

Held, by O'BRIEN, J., that allegation in replication, that the negligence, &c., materially contributed, was no departure from the plaint.

negligently and unskilfully conducted himself in that behalf, and in the conduct and management of the said omnibus, and in the providing thereof with the proper and necessary gear and appliances, and otherwise in relation to the conduct and equipment of the said omnibus, that by reason thereof, and of the negligence and unskilfulness of the defendant and his servants respectively, the said omnibus was precipitated into the lock of a certain canal called the "Grand Canal," and the said Mary Byrne was thereby deprived of existence; and thereupon then and there died; and within twelve calendar months next before the commencement of this suit died.

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Fifth defence:—That said Mary Byrne was not deprived of existence by being so precipitated into said lock, or by any negligent act or omission of the defendant or his servants, *after* said omnibus was precipitated into said lock; but by the act of a third person, not authorised or employed by the defendant or his servants, and over whom neither defendant or his servants had any control, and who acted as hereinafter mentioned of his own mere motion; and but for which act of said third person the said Mary Byrne would not have been deprived of existence on the occasion in said paragraph referred to, but by the act of the lock-keeper at said lock, who, after said omnibus was so precipitated into said canal, wilfully let the water of said canal into said lock, and inundated said lock, and said omnibus and the passengers therein, whereby said Mary Byrne was suffocated and drowned, and of such drowning then and there died.

Third replication to the fifth defence:—That the precipitating of the omnibus into the said lock, through the negligence and unskilfulness of the defendant or his servants, in the plaint mentioned, *materially contributed* to the event whereby the said Mary Byrne was deprived of her existence; and the said Mary Byrne would not have been deprived of existence except for such precipitating of the said omnibus into said lock, through such unlawful acts and omissions of the defendant.—Demurrer thereto.*

* The following points were noted for argument upon the demurrer:—

That the matters in the replication afford no legal answer to the defence;—because the replication admits that Mary Byrne would not have been deprived of

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W. J. Sydney (with him Serjeant *Armstrong*) opened the demurrer.

The plaintiff has not stated anything to connect the lock-keeper with the defendant, so as to make the latter answerable for the act of the former; but has conceded that the death of Mary Byrne resulted from a wilful and unauthorised act of the lock-keeper. Notwithstanding this, the plaintiff replies that the defendant's negligence did, up to a certain stage, *materially* contribute to the event whereby Mary Byrne lost her life; and the question is, whether, in such a state of the pleadings, the doctrine of contributory negligence is applicable? The object of Lord Campbell's Act (9 & 10 Vic. c. 93) was to give to the personal representatives of parties, who had they suffered an injury short of death could have got compensation for that lesser injury, a remedy in cases in which the more grievous injury of death resulted. The defendant is not liable in this action, since the deceased was killed by the act of a person who was not a servant or under the control of the defendant, and whose act was subsequent to the original act of neglect of the defendant. On the authority of *Scott v. Shepherd* (a), it may be contended that the original wrong-doer is liable for *all* the consequences, remote as well as immediate, of his negligence, notwith-

(a) 2 Bl. Rep. 243.

existence but for the act of the lock-keeper, mentioned in the defence; and that the act of the defendant or his servants did not nor could not have occasioned the death of Mary Byrne, only for the wilful and unauthorised acts of the lock-keeper.

And because the replication does not traverse the averment in the defence, that Mary Byrne was not deprived of existence by being so precipitated into said lock.

And because that, even admitting that the said act of the defendant or his servants *materially contributed* to the death of Mary Byrne, nevertheless, as it is admitted by the replication that said material contribution would not have caused her death, only for the said unauthorised acts of the lock-keeper, that the defendant is not liable in this action.

And because the averments in the defence, that Mary Byrne would not have been deprived of existence but for the act of said third person, have not been traversed or put in issue by the replication.

And because the replication is in other respects bad and insufficient in law, and affords no answer good in substance to the defence to which it has been pleaded.

standing the subsequent intervention of another party. But the reason why it was held in *Scott v. Shepherd* that an action would lie against the original wrong-doer was, that the intervenient acts were done in self-defence, so that no action would lie against the other parties; and also because the original wrongful act was not completed until the squib exploded, which explosion was the very result contemplated by the defendant. The extent to which a man is responsible for his acts was the subject of grave observation in the judgment of Pollock, C. B., in *Greenland v. Chapman (a)*, where the learned Chief Baron seems to have thought that a man is not to be "expected to anticipate and guard against that which no reasonable man would expect to occur." For the purposes of this demurrer, the Court must assume that the precipitation into the lock did not cause the death; and that the death was caused by the wrongful subsequent act of a third party, not authorised or excused upon the record, for there is no averment that the act was necessary, or was done *bonâ fide*, and to assist the deceased. The death was not the natural, necessary, or immediate result of the precipitation; and the true construction of Lord Campbell's Act is, that the action can be sustained only in cases in which, if the injury had not resulted in death, the injured party could have brought an action, and in such an action the injury must have been the natural and immediate result of the defendant's negligence. The decision in *Lynch v. Nurdin (b)*, it would seem, can only be upheld on the ground that the whole injury was caused by the defendant's default, as the party injured was a child of ten years; and in *Lygo v. Newbold (c)* the defendant was exonerated on the ground that the plaintiff was of full age.

Again, it may be said that the defendant would have been responsible, even though the death had resulted from surgical treatment. But the principle on which the liability in that case is founded is, that the best means to preserve life were taken, and that the patient was unable to endure the operation. But no such question of supervening agency arises in this action, which ought to

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(a) 5 Exch. Rep. 243.

(b) 1 Q. B. 29.

(c) 9 Exch. Rep. 305.

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have been brought against the lock-keeper.—[LEFROY, C. J. Does Lord Campbell's Act give the right of action at all: or does it do more than take the case of death resulting from injury, out of the rule of the Common Law, "*Actio personalis meretur cum personâ*"? The statute enacts that if a person has a right of action for injuries of this nature, and dies before action brought, the right of action shall not be lost by the death, but shall survive to the representative. So, if Mary Byrne, had she survived, could have brought an action against the defendant for his negligence in precipitating her into the lock, does it not survive to her representative; and is it taken away because the lock-keeper subsequently did her another injury?—The statute goes farther than that. Its true construction is, that the action shall lie only when the death was the natural and necessary result of the defendant's act. The test is this—could the defendant be indicted for manslaughter? In the case of *Regina v. Bennett* (a) the conviction was quashed; Cockburn, C. J., saying — "The keeping of the fireworks in the house by the defendant caused the death only by the superaddition of the negligence of some one else. . . . The keeping of the fireworks, however, did not alone cause the death; *plus* that act of the defendant there was the negligence of the defendant's *servants*."—[O'BRIEN, J. The question comes very much to this—is the meaning of the words in Lord Campbell's Act, "shall be caused by the wrongful act, &c.," to be cut down to this, "shall be caused by the *immediate* wrongful act," &c.? The statute does not limit the class of cases, in which actions may be brought, to cases in which the defendant would be guilty of manslaughter by reason of gross negligence.]—On the Civil side of the Court an analogy exists in actions for special damage, resulting from the act of the defendant. But the damage in such cases, must be the immediate and natural result of the defendant's act.—[HAYES, J. Have you seen the case of *Illidge v. Goodwin*? (b)]—That decision is founded on the principle that the injury was the *natural* consequence of the defendant's act of negligence.—[O'BRIEN, J.

(a) 1 Ball's Cr. Cases, 1; Roscoe's Cr. Ev. (5th edit.), 661; and Alison's Principles of the Laws of Scotland, 145, *et seq.*

(b) 5 C & P., 190.

It is not a very unnatural result of precipitating people into the lock of a canal, that they should be drowned; or that other persons should try to help them out of it?]

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Philip Keogh and J. E. Walsh, contra.

This defence admits every averment in the plaint, except that Mary Byrne was deprived of existence by the precipitation into the lock. Amongst other things it admits that Mary Byrne was not guilty of any neglect: and *Lynch v. Nurdin* (a) shows that, where a party, by no personal negligence, but by the improper neglect of the defendant, is put into a position in which risk is incurred, and an injury is thereby suffered, the defendant is responsible. The defendant who created the risk cannot evade the consequences of his own wrongful act. In *Lynch v. Nurdin*, Lord Denman said, "If I am guilty of negligence in leaving any thing dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." So, here possibly the plaintiff may have a right of action against the lock-keeper, but that fact does not deprive him of the right of action against the first wrongdoer. There is nothing, moreover, on the record to show that the lock-keeper's act was not one which his duty bound him to do at that very moment; or that he even knew that the omnibus was in the lock. *Lygo v. Newbold* (b) in principle confirms *Lynch v. Nurdin*, for in *Lygo v. Newbold* there was no contract to carry the plaintiff. In *Senior v. Ward* (c) it was held that the first wrongdoer is responsible, even though the immediate cause of death was a subsequent wrongful act of a third person.—[HAYES, J. That case was decided on the old principle that a man is not to take advantage of his own wrong.—O'BRIEN, J. The decision in that case does not touch the question, whether the subsequent and wilful act of a third person is a defence.]—It does decide that question, because it

(a) 1 Q. B. 29.

(b) 9 Exch. Rep. 305.

(c) 1 El. & El. 385.

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was the duty of the banksman to test the rope every morning. The case of *Manley v. The St. Helen's Canal & Railway Co.* (a) shows that Lord Campbell's Act applies in *every* case in which a cause of action would have arisen if death had not ensued. The case of *Thorogood v. Bryan* may be relied on by the defendant, but it seems to have been overruled (b). The true construction of Lord Campbell's Act is that suggested by the Lord Chief Justice; and this plea admits that Mary Byrne's death was caused by the defendant's negligence prior to the fall of the omnibus into the lock.

Serjeant *Armstrong*, in reply.

The plaintiff avers that the precipitation into the lock was the *causa causans* of the death of Mary Byrne. But the replication only says that the precipitation materially contributed to the event whereby the death was caused. That is a plain departure, and bad on general demurrer: *Palmer v. Stone* (c). Moreover, the replication does not either traverse or confess and avoid the plea. The action would not have lain if Mary Byrne had survived; she should have sued the lock-keeper.—[LEFROY, C. J. The defendant undertook to carry Mary Byrne safely on a journey. Instead of doing so, he threw her into the lock of a canal; and yet you contend that that act does not afford a cause of action against him.]—Lord Campbell's Act must be construed strictly to mean that an action shall only be maintained in a state of things such that the person had suffered a bodily injury *ejusdem generis* with those for which, under the previous law, an action might have been maintained, namely, injuries from which death might or might not have resulted. Now this record does not show that Mary Byrne could have been hurt at all, if the water had not been let in. The statute gave a new cause for action, and the plaintiff should have brought himself strictly within its provisions. *Illidge v. Goodwin*, and *Lynch v. Nurdin*, were decided simply on the principle that a man is responsible for consequences that may reasonably be foreseen.

J. E. Walsh asked leave to reply to the new point raised by the

(a) 8 C. B. 115.

(b) 1 Sm. Lea. Cas., 254.

(c) 2 Wils. 96; S. C. 2 Wms. Reps. by Saund. 84, f.

learned Serjeant, that the replication was a departure, and contended that it was not; because it is immaterial from which cause the death resulted. The plaintiff is only bound to say, "you, the defendant, threw the omnibus into the lock, and thereby the death followed."

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Cur. adv. vult.

LEFROY, C. J.

The question here is, whether the plaintiff is entitled to recover damages in a case of this description. The writ of summons and plaint complains of an injury arising from the neglect of the defendant, as a keeper of an omnibus in which the party (who appears here by her personal representative) lost her life upon the occasion referred to in the pleadings. The defence made is, that it was not owing to the negligence of the defendant that the deceased came to her death; but that, although she was precipitated into the lock of the canal by the negligence of the defendant, yet she did not come to her death by being so precipitated, but by drowning, which occurred in that lock after she had been cast into it. The law is clear that every party is liable, not only for the immediate consequences of his negligence, but also for the resulting consequences of his acts, whether those acts are acts of violence, or of negligence in breach of a duty which imposed the necessity of care and caution upon him. Since the celebrated case of *Scott v. Shepherd* (a), the law has been perfectly settled, with the concurrence of four most eminent Judges who at that time presided in the English Court of King's Bench—De Grey, C. J., Blackstone, Gould, and Nares, JJ. These Judges differed only upon the point touching the *form* of action which the plaintiff should have adopted in that case in order to assert his right. One of them held that it should have been asserted in an action on the case, while the others held that it might be asserted in an action of trespass. But they all agreed that the defendant was answerable as much for the consequential injury as for the immediate injury.

June 21.

In the present case, it is admitted that the deceased lady was cast into the lock of the canal owing to the negligence of the defendant.

(a) 2 Bl. 893.

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But it is asserted that, when she had thus been put into a position in consequence of which (the lock-keeper having let in the water) she was suffocated, and thus came by her death, the defendant is not answerable, because the water was let into the lock by a person over whom he had no control. It was not the negligence of the defendant that was the immediate occasion of her death; but it was the negligence of the defendant that put her into a position by which she lost her life, as a consequential injury resulting from that negligence; and, although that death was not caused immediately by the act of the defendant, nor was the immediate and instantaneous result of his negligence, yet it was the consequential result of the defendant's act, and enables her representative to maintain this action. At the Common Law such an action could not have been maintained by a personal representative. The right of action died with the person injured; but Lord Campbell's Act (9 & 10 Vic., c. 93) enables the personal representative to maintain this action; and, accordingly, it has been brought to assert the plaintiff's right to damages for the injury which occurred to the deceased.

A demurrer is taken to the third replication to the special defence; and I am of opinion that, even supposing the replication to be bad, the plea is also bad, and that the plaintiff is therefore entitled to our judgment on the summons and plaint, to recover damages for the consequences of the injury which occurred to the deceased, owing to her having been put by the defendant's negligence into a position to suffer that injury.

O'BRIEN, J.

In this case I am also of opinion that our judgment should be for the plaintiff, and that the demurrer taken by defendant to plaintiff's replication to defendant's special defence should be overruled. From the course of the argument, it is requisite to refer, in the first instance, to the summons and plaint. It is objected to by defendant's Counsel, as not having been properly framed, according to the provisions of Lord Campbell's Act (9 & 10 Vic., c. 93), under which this action is brought. That statute provides that "Whosoever the death of a person *shall be caused by any*

"wrongful act, neglect or default, which, if death had not ensued, would have entitled the party injured to maintain an action, and recover damages in respect thereof," then that the personal representative of such deceased party might bring an action for damages against the person who would have been liable if death had not ensued. The objection to the summons and plaint has in fact arisen from plaintiff's not having adopted the plain words of the statute, by stating that the "*death was caused*" by the omnibus having been precipitated into the lock of the canal, in consequence of the negligence and unskilful conduct, &c., of defendant and his servants. Instead of doing this, the first count of the summons and plaint, after stating that, by reason of the negligence and unskilfulness of defendant and his servants, the omnibus was precipitated into the lock of the canal, goes on to state that Mary Byrne "was thereby deprived of existence, and thereupon, then and there, and within twelve calendar months before the commencement of this suit, died." The second count, after stating that by reason of the carelessness, negligence, &c., of defendant and his servants, the omnibus was driven into the lock of the canal, goes on to state—"and the said Mary Byrne was therein and almost instantaneously deprived of life, and died within twelve calendar months." The summons and plaint might perhaps, under our former system of pleading, have been open to a special demurrer, on the ground that these statements in it were ambiguous, and that they did not clearly show whether Mary Byrne's death was caused by the concussion or other immediate effect of the omnibus having been precipitated into the canal, or whether it was caused by the remoter consequences of such precipitation. Even supposing, however, that this objection would have been available on special demurrer, before the Common Law Procedure Act, it cannot now be relied on, particularly upon a demurrer taken to a subsequent pleading. The special defence now before us states more clearly the circumstances under which the death took place. It does not deny (and therefore, for the purposes of this Act, admits) the charge in the summons and plaint, that the omnibus was precipitated into the lock by the

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negligence unskilfulness, &c., of the defendant and his servants. But it further states, in substance, that Mary Byrne was not deprived of existence by being so precipitated into said lock, or by any negligent act or omission of defendant or his servants *after* said precipitation, but by the act of a third person (the lock-keeper), who was not authorised or empowered by defendant or his servants, and who after said precipitation wilfully let the water of the canal into the lock, and inundated the lock, and also the omnibus and the passengers therein, whereby Mary Byrne was suffocated and drowned, and died of such drowning. The defence also states, that but for said act of the lock-keeper, Mary Byrne would not have been deprived of existence on the occasion in question.

The plaintiff, by his replication to that defence, does not allege that there was any negligence, unskilfulness, &c., on the part of the defendant or his servants *after* the precipitation of the omnibus, but states "that the precipitation of the omnibus into said lock, through "the unskilfulness of defendant or his servants, materially contributed to the death of Mary Byrne, and that she would not have "been then deprived of existence, except for such precipitating of "the omnibus into the lock, through such wrongful acts and omissions of defendant."

To this replication defendant has demurred, and his Counsel contend, that even assuming the omnibus to have been precipitated into the lock by the negligence of defendant's servants, yet that inasmuch as the death of Mary Byrne would not have happened but for the subsequent act of the lock-keeper in letting in the water, it cannot be held that the death "*was caused*" by the negligence, &c., of defendant or his servants, so as to bring the case within the provisions of the statute, and to make defendant liable to an action under it. I do not however concur in this reasoning. The precipitation of the omnibus into the lock was certainly one cause, and (as it may be said) the primary cause of her death, inasmuch as she would not have been drowned but for such precipitation. It is true that the subsequent letting of the water into the lock was the other and more proximate cause of her death, and that she would not have lost her life but for such subsequent act, which was not the *neces-*

sary consequence of the previous precipitation, by the negligence of defendant's servants. But, in my opinion, defendant is not relieved from liability for his primary neglect, by showing that but for such subsequent act the death would not have ensued. It was admitted by Serjeant *Armstrong*, that if the water had been let into the lock *before* the precipitation of the omnibus, and that Mary Byrne had been immediately drowned thereby, it would be no ground of defence to say, that Mary Byrne would not have lost her life if the water had not been let in. And it would be a singular construction of the act to hold that the decision should be different because the letting in of the water was *subsequent* to the precipitation. As the precipitation was caused by the negligence of defendant and his servants, defendant was *primâ facie* answerable for the results of that act. There was no subsequent act, or negligence, on the part of Mary Byrne, which at all contributed to her death. And even assuming (what indeed is not stated in the pleadings) that the letting in of the water was a wrongful and improper act on the part of the lock-keeper, yet, as Mary Byrne was in no way answerable for that act, I do not think that defendant would be thereby exonerated from his responsibility for his primary neglect.

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We have been referred to the case of *Thorogood v. Bryan* (a), which was also an action under Lord Campbell's Act. The facts of that case, and the principle upon which it was decided, are different from those in the present case, but some of the observations of Mr. Justice Cresswell during the argument bear upon the question now before us. In page 120, he says, "Must not the negligence which is to exonerate the defendant be the negligence of the plaintiff or his agent?" And again, in page 121, "It seems strange to say that A shall not be responsible for his negligence, because B has been negligent also, C being the party injured." I am accordingly of opinion, that upon this, the substantial question in the case, our judgment should be for the plaintiff.

Another objection was relied on by Serjeant *Armstrong*, namely, that even supposing (as contended for by plaintiff) that the summons and plaint does not substantially disclose a case within the

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statute, of the death having been caused by the negligence of defendant's servants in precipitating the omnibus into the canal, then that the replication is a departure from the summons and plaint, inasmuch as it only charges that such precipitation materially contributed to the death. In my opinion, however, this objection is not sustainable. If we be right in holding, as we do, that although the negligence of defendant's servants was not the whole or proximate cause of the death, yet that, on the facts disclosed by the pleadings, such negligence was the cause of the death, within the meaning of the statute, on the ground that it materially contributed to the death, and that but for such negligence the death would not have occurred; then it follows, in my opinion, that the replication is not a departure. It does not state any new fact which does not substantially appear upon the previous pleadings, but its purport is, that upon the facts disclosed by those previous pleadings, the death was caused by the negligence of defendant's servants, within the meaning of the statute, because such negligence materially contributed to the death, and but for such negligence the death would not have occurred.

HAYES, J.

I have very little more to do than to express my concurrence in the judgment of the Court, and in the reasons given by my LORD, and my Brother O'BRIEN. If our decision rested on the goodness of the replication alone, I should be very much disposed to allow the demurrer; because I think that the replication is bad, it neither traverses any material allegation of the defence, nor confesses and avoids it. But then going a little further back, and looking at the defence, I think that it also is bad; and therefore the defendant, being the person who committed the first error, must be the sufferer by our decision. It is because the defence is bad, and not because the replication is good that our judgment must be for the plaintiff.

The defence is bad, for the reasons expressed by the LORD CHIEF JUSTICE. It begins, for a further defence to both counts, by saying that "Mary Byrne was not deprived of existence by being so precipitated into said lock." If the defence had stopped there, I would have had great difficulty in saying that it was bad; because that is

a direct traverse of a material allegation in the plaint and in the very words of the plaint.

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But then the defence proceeds (and we must look at the whole of it, in order to extract its true nature and character) to tell us that a third person came and raised the sluices unlawfully, and inundated every person there, and that by that act of the third person, over whom neither the defendant or his servants had any control, Mary Byrne was drowned. The gist of that is, that the defendant asserts he is responsible only when his acts or neglect is the immediate proximate cause of death. I do not agree in that. I think that by Lord Campbell's Act (9 & 10 *Vic.*, c. 93), as is shown by the plain language of it, it was meant to extend to the case of a death resulting from gross negligence, and in favor of a personal representative, the very law and remedy which had previously existed in favor of the party in case of injury short of death. If then, we are asked, what would have been the law if this lady, instead of being drowned by the inundation, had merely received a bodily injury, and had lived to bring the action herself? Could she have maintained an action against the owner of the omnibus who had (perhaps without inflicting any bodily injury) deposited her in the lock of the canal; or must she have sought a remedy solely against the lock-keeper, who, probably from the best motives, had been induced to let in the water? I think that it requires little more than to state the proposition, to show that it cannot be good law; and simply because it is not good sense. Beginning with the case of *Scott v. Shepherd* (a), and, going on through a series of authorities to *Lynch v. Nurdin* (b), and *Illidge v. Goodwin* (c), one is not surprised to find that the law is well settled by authority, that the party who is guilty of the first act of trespass or neglect must be responsible for all its natural consequences and results. Therefore, I have no difficulty in saying that the argument for the defendant, upon the construction of Lord Campbell's Act, is not sound, and that our judgment ought to be for the plaintiff, overruling the demurrer, the defence being bad in law.

(a) 2 BL. 892.

(b) 1 Q. B. 29.

(c) 5 C. & P. 190.

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Exch. Cham.

Court of Exchequer Chamber.*

REGISTRY APPEALS.

PARKINSON, Appellant; BROPHY, Respondent.

PARKINSON, Appellant; AIRD, Respondent.

HAMILTON, Appellant; NEWCOMEN, Respondent.

Nov. 30.
 Dec. 3.

PARKINSON, Appellant; BROPHY, Respondent.

Parliamentary
 Voters Act
 (13 & 14 Vic.,
 c. 69), sec-
 tions 22, 23,
 and 26, form
 (No. 12)
 schedule (A).

The notice
 of objection,
 form No. 12,
 schedule (A)
 must be signed
 upon the day
 it purports to
 bear date.
 (HAYES, J.
dissentiente.)

THIS was a consolidated appeal from the decision of the Chairman of the County Dublin, made at the Revision of the List of Voters for the County Dublin, in October 1864. The name of the respondent on the supplemental list for the barony of Coolock was objected to by the appellant. The following was the case stated for appeal.

"In the notice of objection given to the Clerk of the Peace the date was printed and stated thus: 'Dated the 10th day of August, in the 'year 1864.' And in the notice served upon the claimant, also in 'print, the date is stated as, 'this 10th day of August 1864.' The supplemental list for the said barony was duly published on or before the 22nd of July. The objector could not say *on what day he signed* the notices of objection, but that they were signed by him some time in the month of August, and *after* the 10th of August, but before they were served. It was contended that the notices were insufficient; and I was of opinion, that as they were not proved to have been signed on the day they bear date, they were bad, and I retained the name of the claimant on the list; if I was mistaken, his name is to be expunged. There were several other cases similar in point of law to the foregoing, and I have consolidated them with this appeal, and they are to be governed by the decision in this case.

"A list of the names that may require to be expunged is

* *Coram* O'BRIEN, J., HAYES, J., FITZGERALD, B., HUGHES, B.,
 FITZGERALD, J., DEASY, B.

"appended to this appeal, and also the notice of objection to the
 "Clerk of the Peace, and the counterpart of that to the person
 "objected to.—C. J. TRENCH."

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Exch. Cham.
 BROPHY'S
 CASE.

F. Macdonogh, H. E. Chatterton, and W. B. Kaye, for the appellant.

This case turns upon the construction of the 26th section of the 13 & 14 Vic. c. 69.* The 21st section provides for the publication of the "supplemental list" upon the 22nd of July in each year. By the twenty-sixth section, any duly qualified voter may object to the claimant's name being retained upon the supplemental list, provided he delivers the notice of objection to the claimant, or leaves it at his house, on or before the 20th of August in each year. The time of signing the notice is immaterial, while the time of service is material. *Primâ facie*, the notice was signed upon the day it bears date. If a deed be dated when it is delivered, it is to be presumed that it was dated, signed, and sealed on one and the same day. An agent about to serve a notice to quit, will date the notice the 29th of September, and will then forward it to England, perhaps, for the landlord's signature, which may be attached on the 27th of September, yet, could it be said that that notice would be bad? Proof of the date of a deed is never required. A date is requisite to the notice of objection, *i. e.*, a date must appear in the frame of it, but the date of the service of the notice is the material point. If the time of service be questioned, it may be proved by the postmaster, or by proof of service. The notice must

* The following are the material portions of the 13 & 14 Vic. c. 69, s. 26:—

"Every person who shall be upon the register of voters for the time being, for any such county, may object to any other person upon any list of voters, or list of claimants for such county, as not having been entitled, on the 20th day of July then next preceding, to have his name inserted in any list of voters or claimants for such county; and every person so objecting, should, on or before the 20th day of August in each year, give, or cause to be given to the Clerk of the Peace of the county, a notice according to the form (No. 11) in the said schedule (A); and the person so objecting, shall, on or before the 20th day of August in each year, give, or cause to be given to the person so objected to, or leave or cause to be left at his place of abode, as described in such list, a notice according to the form (No. 12) in the said schedule (A), or to the like effect; and every such objection shall be signed by the party so objecting as aforesaid."

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Erch. Cham.
 BROPHY'S
 CASE.

be perfect in its form. It must show first, that the objector is qualified to object; secondly, that the claimant is accurately named; thirdly, that the date is anterior to the 20th of August; and, fourthly, that the notice of objection is actually signed by the objector. Could the Chairman inquire whether a notice of objection dated the 10th of August was signed before or after twelve o'clock at midnight of the 9th of August? The Court will only look to see if the requirements of the statute have been complied with on the face of the notice: *Samuel, appellant, Hitchmough, respondent (a)*; *Rawlins, appellant, Overseers of West Derby, respondents (b)*; *Lewis, appellant, Roberts, respondent (c)*. The "year" must appear in the frame of the notice: *Beenlen appellant, Hockin, respondent (d)*. The notice of objection must be personally signed by the objector: *Toms, appellant, Cuming, respondent (e)*. In the latter case, while Maule, J., shows the importance of the claimant objected to proving the name and abode of the objector, as a guarantee of the *bona fides* of the objection, he does not treat the time of signing the notice of objection as in anywise material.

The *Solicitor-General (J. A. Lawson)*, Sergeant *Sullivan*, and *P. Keogh*, for the respondent.

The question before the Court is, not the materiality of the date of the notice of objection, but whether the statute requires the date and signature to be contemporaneous. The 118th section of the 13 & 14 *Vic.*, c. 69, incorporates the schedule to that Act with it. The 26th section of that statute requires the objector to serve two notices—one on the Clerk of the Peace, the other on the person objected to. The objection before the Court is framed in accordance with form No. 12. What other meaning can be put upon the words, "Dated this — day of — 1864," but "Given this — day of —," "Given under my hand," as, in a Precept? "Dated"

(a) 13 Com. B., N. S., 3.

(b) 15 Law Jour., C. P., 70.

(c) 31 Law Jour., C. P., 51.

(d) 4 Com. B. 19; S. C., 1 Lutw. Reg. Cas. 526.

(e) 7 M. & G. 88; S. C., 1 Lutw. Reg. Cas. 200.

means the precise time when the instrument is executed. "Dated" is synonymous with "Now when I sign it;" and the objector is to state that time correctly to the person objected to. The argument of the appellant, as to immateriality of the date, would apply with equal force to all the other requisites of the statute, which involves an absurdity. The date is not necessary to deeds or to notices to quit, as they both take effect from delivery. Unless this Court overrules *Beenlen*, appellant, *Hockin*, respondent (a), the notice under consideration was wrongly dated. "What is meant by 'dated?' says Wilde, C. J., in that case. "It means that the time should be fixed at which a particular act is done;" i.e., when the signature was attached to the notice in question. "Date" is defined in Webster's Dictionary to be "the time when anything happened; the time when anything is to be done." As the Legislature leans towards the franchise, a correct date is required to the notice of objection. A notice or claim to be put upon the registry is construed more liberally, and need not be signed by the claimant personally: *M'Niffe*, appellant, *M'Tiernan*, respondent (b).

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CASE.

The notice of objection must contain his true place of abode at the time the objector signs the notice: *Courtis*, appellant, *Blight*, respondent (c); *Melbourne*, appellant, *Greenfield*, respondent (d). To discover whether the objector has stated his true place of abode at the time he signed the notice, it is absolutely essential that the notice should bear the true date of signature. The person objected to has a right to have every advantage against his opponents arising from any discoverable error. The presumption of law that written instruments are signed upon the day they purport to bear date, may be rebutted, and the date impeached: *Anderson v. Weston* (e). The claimant had a perfect right to raise the objection; and the Chairman was bound to entertain it, and had ruled correctly upon it.

(a) 4 Com. B., N. S., 19; S. C., 1 Lutw. Reg. Cas. 526.

(b) 3 Ir. Com. Law Rep. 186.

(c) 1 Ke. & Gr. 475.

(d) 1 Ke. & Gr. 241.

(e) 6 Bing. N. Cas. 296.

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Exch. Cham.
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 CASE.

H. E. Chatterton in reply.

The date is immaterial in the form No. 12. The notice of objection need not follow that form, but need only be to the like effect. The headings in the forms in the schedules to the Act are no part of the Act: *Murphy, appellant, Connor, respondent (a)*. The claimant should not have been permitted to impugn the notice by matters *dehors* the notice. *Beenlen, appellant, Hockin, respondent (b)*, is no authority in this case. The question raised there was not that now before this Court. There was no subject-matter there for the Court to deal with, as the year in which the notice was served was omitted; and the Court rightly held the notice bore no date at all.

Cur. adv. vult.

PARKINSON, *Appellant*; AIRD, *Respondent*.

THIS was a consolidated appeal from the decision of the Chairman of the County of Dublin, the Hon. C. J. Trench. The name of the respondent on the claimant's list for the barony of Rathdown was objected to by the appellant.—“In the notice of ‘objection given to the Clerk of the Peace, the date was printed ‘and stated thus—‘Dated the 10th day of August, in the year ‘1864;’ and in the notice given to the party objected to, the ‘date, also in print, was—‘Dated this 10th day of August ‘1864.’”

“The list of claimants for the barony of Rathdown was published on the 11th of August 1864, the last day for its publication. “The notices were not signed by the objector until after the “10th of August, but were signed by him between the 11th and “the 20th of August, and before they were served. The notices “were duly served upon the persons objected to, after the publication of the claimant's list, and upon the Clerk of the Peace, “and duly published by the latter. It was contended that the “notices were insufficient; and I was of opinion, as they had “not been signed on the day they bore date, they were bad;

(a) 3 Ir. Com. Law Rep. 203.

(b) 1 Lutr. 526.

"and I retained the name of the claimant on the list. If I was mistaken, his name is to be expunged," &c., &c.—"C. J. TRENCH."

M. T. 1864.
Exch. Cham.

AIRD'S
CASE.

F. Macdonogh, H. E. Chatterton, and W. B. Kaye, for the appellant.

This case turns upon the construction of the 22nd, 23rd and 26th sections of the 13 & 14 Vic., c. 69. By the former section, the Clerk of the Peace is bound to make out, on or before the 9th of August in each year, a list of persons claiming to be entitled to vote for each county; and by section 23rd, to "sign and publish" that list on or before the 11th of August in each year. The place of abode of the objector means his residence at the time of the service of the objection. Provided the service of the notice take place before the 20th of August, the time of signature is immaterial.

The *Solicitor-General (J. A. Lawson)*, Sergeant *Sullivan*, and *P. Keogh*, for the respondent.

Until the Clerk of the Peace "signs and publishes" the list of claimants it has no existence: *Brumfitt, appellant, Brenner, respondent (a)*.

Chatterton, in reply.

The signature before the publication of the list is immaterial. It may be said to have been signed *de bene esse*. The list of claimants was in existence upon the 9th of August, although not published until the 11th.

Cur. adv. vult.

HAMILTON, *Appellant*; NEWCOMEN, *Respondent*.

THIS was a consolidated appeal from the Chairman of the County of Dublin. The name of the appellant in the claimant's list for the barony of Coolock was objected to by the respondent.

Dec. 1, 3.

(a) 1 Ke. & Gr. 352.

M. T. 1864.
Exch. Cham.
 NEWCOMEN'S
 CASE.

The following was the case stated :—" In the notice of objection "given to the Clerk of the Peace, the date was printed and stated "thus—'Dated the 13th day of August 1864;' and the notice "served upon the claimant, also in print, is dated as, "This 13th "day of August 1864.' The list of claimants of the said barony "was published on the 11th of August, the last day for its publication. The objector could not tell whether he had signed the "notices on the 13th, the day of their date, or one or two days "afterwards. It was contended that the notices were insufficient; "and I was of opinion, that as they were not proved to be signed "on the day they bore date, that they were bad; and I retained "the name of the claimant on the list. If I was mistaken, his "name is to be expunged," &c., &c.—"C. J. TRENCH."

The *Solicitor-General (J. A. Lawson)*, Sergeant *Sullivan*, and *P. Keogh*, for the appellant.

The presumption upon the evidence as stated is, that the notices in this case were signed upon the 13th of August. It was necessary for the respondent to prove that the notices were not signed on the 13th: *Anderson v. Weston and Badcock* (a); *Avery v. Bowden* (b); *Williams v. The East India Company* (c); *Mac Mahon v. Leonard* (d).

F. Macdonogh, *H. E. Chatterton*, and *W. B. Kaye*, for the respondent.

This appeal is not distinguishable from that of *Parkinson*, appellant, *Brophy*, respondent (e); nor was there any ground for the appeal. The facts were conclusive against the appellant; and on them the Chairman should have ruled the case against him: *Bretherton on Registration*, pp. 230 and 199, par. 4.

Sergeant *Sullivan*, in reply.

Cur. ad. vult.

(a) 8 Scott, 583.

(b) 6 El. & B. 973.

(c) 3 East, 199.

(d) 6 H. of L. Cas. 993.

(e) *Supra*

DEASY, B.

In these three cases the question is, whether the Chairman was right in deciding that notices of objection purporting to be signed on the 10th and 13th of August respectively, but not signed on these days, were insufficient. The question depends on the true construction of the 26th section of the Parliamentary Voters Act, and the form of objection No. 12 in the schedule to that Act. The 26th section requires the party objecting to any existing voter, or any new claimant, to serve on the person objected to, on or before the 20th of August in each year, a notice, according to the form No. 12 in the schedule A, or to the like effect; and requires every such notice to be signed by the party objecting. By the 118th section, the schedules are declared to be a part of the Act; and the form No. 12 contains at the foot these words:—"Dated this — day of — 18—. Signed, A B, of —, place of abode —, being now registered "or on the list of voters for the county of —." It was admitted by Counsel for the appellant that, taking the section and the form together, the Act requires that the notice should contain a date; and that at once distinguishes it from the cases of deeds, which do not require a date, and from which, according to *Co. Lit.*, 6a, the date was in ancient times frequently or usually omitted; and the cases of notices to quit, to the efficacy of which a date is not essential. It was contended, however, that it was not necessary that the notice should contain an accurate statement of the date, but that any date between the 22nd of July and the 20th of August, in the case of persons already on the register, or between the 9th of August and the 20th of August, in case of claimants, would suffice, because it was utterly immaterial to show upon what precise day, in those intervals, it was actually signed by the objector. I cannot concur in that argument, or in the allegation of immateriality, on which it was based. When an Act of Parliament requires, as it is admitted the Act here required, that a document signed and intended to be served upon another should state its date—that is, the day on which it was signed; for one would presume that it was for the purpose of giving

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information to the party on whom it was to be served of the exact date—that is, of the precise day on which it was signed,—and that the Legislature did not contemplate the insertion of an imaginary date, like that which has been inserted in the cases before us; for we have not to deal with the case of mistakes. In the cases before us there has been no mistake. The objector states that he is positive the objections were not signed on the 10th, when they purported to have been signed; and he is unable to state at what day between that day and the 20th they were actually signed.

In the absence of some preponderating inconvenience, I think we ought to require a strict compliance with what the Act purports to require on the part of the objector. Any one reading the form would I think come to the conclusion that the person signing was to specify in the document signed the day on which he signed it. It contains a blank for the day, after the words “dated this — day of —,” and after the signature and place of abode come the words, “being now registered,” &c.; the word “now” plainly referring to the blank which was to be filled up with the day of the month. But it does not rest on the presumption which one would draw from the language of the statute. The decisions upon the similar form in the analogous English Act are in my opinion conclusive upon this question. In *Toms v. Cuming* (a), it was decided that the objection must be signed by the party objecting personally; thus indicating the disposition on the part of the Court to require literal compliance with the terms of the Act.

Then, in *Beenlen v. Hockin* (b), the Court of Common Pleas held that it was indispensable that the notice of objection should state the year. In giving the judgment of the Court, Tindal, C. J., says:—“I am not at liberty to entertain considerations of inconvenience, because I have no difficulty in collecting, from the language of the statute, that it was intended that the notices ‘should be dated.’ What is meant by ‘dated’? It means that the time should be fixed at which a particular act is done. If

(a) 1 Lutw. 200.

(b) 1 Lutw. 526.

it means that the time should be fixed at which the act—that is, the signature of the notice—is done, ought not the day as well as the year be fixed. Otherwise, how is the time at which it is done fixed? But the decisions as to the place of abode of the objector appear to me to be conclusive upon this question. In *Knowles v. Brooking* (a), it was held by Tindal, C. J., Coltman, J., and Erle, J. (Maule, J., dissenting), that the place of abode stated in the objection should be, not that stated opposite the name of the objector on the list of voters, but his true place of abode at the time of giving the notice. That was again discussed in *Melbourne v. Greenfield* (b), and the Court came to a similar conclusion; and Erle, C. J., says, page 276:—"I am of opinion that the words, taken in their ordinary acceptation, would mean the present place of abode of the objector when he signs the notice." Crouder, J., says, page 277:—"I cannot entertain a doubt that any man who finds that he is bound by the direction of an Act of Parliament to sign a notice thus, A B of (place of abode), would understand the Act to mean that the person was to sign and date the notice from the place of abode at which he is at the time of signing." Then, if the party objecting is required to state, for the information of the party objected to, his true place of abode at the time he signs the notice of objection, it necessarily follows that he should state truly in the objection the time, including the day of the month on which he signs it. If he do not, how is the other party objected to to find out what was his place of abode at the time of signature, if the time of signature be left undefined and at large, within the limits contended for here on behalf of the appellants?

It has been contended that it was immaterial what was the date of the notices of objection, provided it were between the limits to which I have referred; but I think that is not a question into which we ought to enter. Our duty is to decide whether the Act requires it, and not to discuss the reasons for requiring it. Accordingly, I find that Tindal, C. J., says, in *Knowles v. Brooking* (c):—"I

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Esch. Cham.

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(a) 1 Lutw. 461.

(b) Ke. & Gr. 261.

(c) 1 Lutw. 468.

M. T. 1864. "forbear to enter upon any examination of the convenience or
Erch. Cham. "inconvenience of either decision, not only because they appear to
 BROPHY, "me to be nearly, if not quite, balanced, but because I think
 AIRD, AND "that, unless there is some preponderance in that respect, our
 NEWCOMEN'S "determination ought to rest on the words of the statute itself."
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I therefore think it unnecessary to assign any reasons for the signature requiring a true or accurate date to be given to those notices of objection. But if it were necessary, I think it would not be difficult to suggest reasons for requiring such accuracy. It might happen, for instance, that a notice dated the 23rd July, might be served on the voter on the 20th of August, and he might inquire at the place of abode of the objector stated in it, and finding that no such person lived there on the 23rd of July, might go before the Registry Court, relying on that answer to the objection, without being prepared with any proof of his qualification, and then he might be turned round by proof on the part of the objector, that the objection was not signed until the 19th of August, and that he was then residing at the place stated in it as his place of abode.

The case No. 2, *Parkinson, appellant, Aird, respondent*, on our list of appeals, is an illustration of the difficulties which might arise from holding that the statute did not require accuracy of date. There the objection was to one appearing on the list of claimants. The objection was dated the 10th, and the list was not published until the 11th. The claimant then concluded that the objection was bad, as the list was not published until the 11th, and the objector sought to get rid of the objection by proving that the objection was not signed until after the 10th, when it purported to have been signed.

That shows that inconvenience may result from the doctrine contended for by the appellant. that the objector may date his notice on one day, and prove it was signed on some other day within the limits to which I have referred. But independently of any considerations of convenience or inconvenience, I rest my judgment on the words of the Act, the form given in the schedule, and the decisions on the similar English Act, which leave no

doubt on my mind as to what was required by the Legislature to be inserted in a notice of objection.

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I altogether disclaim the principle of construction, to which some reference has been made, that the Court should lean in favor of the franchise. I recognise no such principle as applicable to the questions arising before this Court. They are to be decided like all other questions upon modern Acts of Parliament, according to the construction which the Court ought, on the settled principles of construction, to put upon the language used by the Legislature. If, on the one hand, it was the intention of the Legislature that certain classes of persons possessing certain defined qualifications should exercise the elective franchise, it was equally their intention that those who did not possess those qualifications should be excluded from its enjoyment. It is the province and the duty of the Revision Courts in the first instance, and of this Court, on appeal from them, to determine within which class any claimant of the franchise is to be placed, and that is to be determined by the application of the words of the Act regulating the franchise, interpreted in their ordinary sense, to the facts of each particular case.

O'BRIEN, J., FITZGERALD, B., HUGHES, B., and FITZGERALD, J., concurred.

HAYES, J.

It is quite plain, from looking at the form given in the statute, that the notice of objection ought to bear on the face of it a perfect date, that is, it should be dated as of a certain day, month, and year; but then the question arises, whether the precise and true date of signature is material; and whether the instructions thus given by the form, must be strictly observed, so that any deviation from the true date of signing the notice will necessarily vitiate the notice, whether such deviation has arisen from mistake or design? To judge of the materiality of the date, let us consider the purposes for which it is required. Two, and only two, purposes have been suggested, one for giving certainty to the subject of the objection, and the other for giving certainty to the person of the

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objector. In order to fix with precision the very test on which the party objected to is said to appear, inasmuch as that is not specified in the body of the notice, but is to be collected by a reference to the date, it will be necessary to fix a time after the publication of the list referred to; but it appears to me, for that purpose, to be wholly immaterial what day may be fixed on, between the time of publication and the service of the objection.

But then it is said, for the respondent, that the date thus to be given, must not only be a perfect date, but must also be the very date on which the objection has been signed, and that any mistake in that respect would be fatal. I can see neither reason or authority for that. The expression "true date" used by Wilde, C. J., in *Beenlen v. Hockin* (a), is, so far as regards any greater particularity than I have mentioned, wholly extra-judicial. Besides fixing the precise test referred to in the objection, the only other use that has been attributed to the insertion of the date is the fixing of the residence of the objector, at the time the notice purports to be signed. For that purpose, I think it important, as supplying the person objected to, with notification of his whereabouts at that time, and by which notification he must be bound, so that if it be found on inquiry that on the day mentioned the objector was not resident as he describes himself, then, on proof of that fact, the notice of objection will, I think, fall to the ground. The insisting on the insertion of the very date on which the objection is signed might be productive of great inconvenience. Thus it might happen, that on the day the objector signed the notice, he might be temporarily resident in an hotel, or in the house of a friend, while in a state of transition from one place of residence to another, perhaps not then determined on. And it certainly would convey more useful information to the voter, were he to give his true and well-known residence at a time shortly previous to that on which his signature is affixed, than to insert the place of temporary sojourn at that time. In short, I think, every useful purpose will be served by inserting as the day of the date some day between the publication of the list and the service of the notice of objection, at which the

(a) 1 Lutw. 526; S. C. 4 Com. B. 19.

party was actually resident at the place as of which he describes himself. M. T. 1864.
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Holding these views, I think the notice mentioned in *Parkinson v. Brophy* was sufficient, and in *Parkinson v. Aird*, insufficient. I also think that in *Hamilton v. Newcomen* it was sufficient.

MORIARTY, *Appellant*; WYNNE, *Respondent*.*

AHEARN, *Appellant*; WYNNE, *Respondent*.

Dec. 1, 17.

THIS was an appeal from a decision of the Chairman of the East Riding of the county of Cork, made at the revision of the list of voters for the borough of Mallow, 1864:—"The appellant appeared upon the register, as having a qualification of a £20 rentcharge, on the list No. 8 of voters for the borough of Mallow. The respondent objected, and in proof of his objection gave in evidence, duly stamped with the stamp of the Mallow post-office, a notice of objection, directed to the appellant at his place of abode, as described in the list of voters. On the back of the notice so produced the name and address of the voter were written. On behalf of the voter was produced a copy of the notice sent to him by post; and on the back of the notice so sent neither the name nor the address of the voter appeared. It was proved that the notice was sent in an envelope, postage free, by post to the voter, with the same address on the envelope as stated on the back of the stamped notice. The only point relied on by the voter was, that, inasmuch as the stamped notice of objection had the name and address of the voter written thereon, the copy sent to him by post without such name or address on the back thereof was not in that respect a duplicate,

13 & 14 Vic.,
c. 69 (Parliamentary Voters Act)
s. 113.

The name and address of the person objected to must be indorsed upon both the notices of objection brought to the postmaster.

An objector gave in evidence a notice of objection, duly stamped by the postmaster, with the name and address of the voter objected to indorsed upon it. The duplicate notice of objection, unindorsed, was delivered by post to the voter, in an envelope directed to the same address as the indorsed,

ment of the stamped notice.—*Held*, that the notice served was not a "duplicate," and was not duly "directed" to the party objected to (FITZGERALD, B., and DEASY, B., *dissentientibus*).

* *Coram* O'BRIEN, J., HAYES, J., FITZGERALD, B., HUGHES, B., FITZGERALD, J., and DEASY, B.

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"within the meaning of the Act. I held the stamped notice given
 "in evidence was sufficient; and I called on the voter to prove
 "his claim. On his declining to do so, relying on the point already
 "adverted to, I expunged the name; and, if the Court should be
 "of opinion that there was not a sufficient notice of objection,
 "the name ought to be retained.—D. R. KEANE."

J. C. Neligan and *W. M. Johnson*, for the appellant.

The 36th section of the 13 & 14 *Vic.*, c. 69, declares who may object to a voter's name being inserted upon any list; and the 113th section declares the mode in which an objection is to be made. The notice of objection served upon the voter failed to comply with the requirements of the 113th section, in two respects; in the first place, the notice was not sent by post, *open*, but in an envelope; secondly, the notice was not a *duplicate* of that delivered to and stamped by the postmaster, as it did not contain the name and address of the voter upon the back.

The corresponding section of the Registration Act in England (7 *Vic.*, c. 18, s. 100) has been construed very strictly; and it has been distinctly decided that the notice in question was not "a duplicate": *Birch, appellant, Edwards, respondent (a)*; *Toms, appellant, Cuming, respondent (b)*—*per* Tindal, C. J. Whether the notice served on the voter was a *duplicate* or not, is the sole question raised by this appeal: *Nunn, appellant, Denton, respondent (c)*—*per* Tindal, C. J.

C. Andrews and *H. Leslie*, for the respondent.

It is sufficient if the notice of objection reach the hands of the person objected to: *Hornsby, appellant, Robson, respondent (d)*.—[FITZGERALD, J. That is, in case you have complied with all the requirements of the statute.]—The production of the notice stamped by the postmaster, and returned to the person producing it, is evidence that the notice of objection reached the person objected

(a) 5 Com. B. 45-49.

(b) 7 Com. B. 88-93.

(c) 1 Lutw. 178-183.

(d) Ke. & Gr. 66; S. C., 1 Com. B., N. S., 63.

to: *Lewis, appellant, Roberts, respondent (a)*. The service of the notice in an envelope was immaterial: *Smith, appellant, Huggett, respondent (b)*. It is sufficient if the notice reach the hands of the party objected to: *Jones, appellant, Innons, respondent (c)*; *Smith, appellant, Huggett, respondent (d)*. As to whether this Court can go into the whole case, or only the points ruled by the Chairman—*West, appellant, Robson, respondent (e)*.

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W. M. Johnson, in reply.

Smith, appellant, Huggett, respondent, and *Jones, appellant, Innons, respondent*, have no application here. There, it was sufficient to serve the notices of objection upon the overseers of parishes; and several objections were made up in packets. There was no dispute in those cases as to the notice served being a duplicate of the original. Here, the only question is, whether the notice served was a duplicate or not.

Cur. adv. vult.

DEASY, B.

In this and the next case (*Ahearn, appellant, Wynne, respondent*), the only question reserved by the Chairman is, whether there was evidence of the service of notice of the objection on the appellants? To prove due service, the respondent produced a duplicate of the notice of objection, stamped by the postmaster, pursuant to the 113th section of the Parliamentary Voters Act, complying in all respects with the terms of the section, containing upon the back of it the address of the appellant, as appearing on the then register. The production of that stamped duplicate is made by the 113th section evidence of its receipt by the voter at the place mentioned in the duplicate, at the time at which, according to the ordinary course of post, it would have been

Dec. 17.

(a) 11 Com. B., N. S., 23; S. C., 3 Jur., N. S., 485; S. C., 31 Law Jour., C. P., 51.

(b) 11 Com. B. 55; S. C., Ke. & Gr. 434.

(c) Ke. & Gr. 21.

(d) *Supra*.

(e) Ke. & Gr. 154; S. C., 3 Com. B. 431.

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delivered at that place. No objection was made to the correctness of the duplicate produced; nor was it contended that, in the ordinary course of post, the notice would not have reached the place mentioned in it. But a notice, corresponding with the alleged duplicate in all respects, except that it did not contain any address, was produced, along with an envelope bearing an address exactly corresponding with that indorsed on the duplicate, and the proper post-office stamp was produced on behalf of the voter; and it was contended that proved the document retained and produced by the objector was not a duplicate of that transmitted by the post. I am of opinion that the objector here has done all that was required of him by the 113th section. That section requires him, in a case like the present, to bring to the postmaster his notice of objection, "duly directed," open and in duplicate. That he has done in the present case. The notice is brought to the postmaster, duly directed, open and in duplicate; and the only possible objection is, that the direction which was endorsed on the duplicate retained was put on an envelope, and in that state handed with the other duplicate to the postmaster. If the section requires that the direction which the objector is required to give to the postmaster, in order to enable him to transmit the notice of objection to the voter, should be on the same piece of paper as the notice, then the objector here has failed to comply with the provisions of the section. But I do not see anything in the words of the section which necessitates such a construction. What he is to do, as I said, is, to bring to the postmaster the notice and duplicate, duly directed. The postmaster is then to compare the notice and duplicate, and, on being satisfied that they are alike in their addresses and contents, he is to forward one to one address, and he is to give the other, duly stamped, to the objector. That is the duty imposed on the postmaster of satisfying himself that he has got from the objectors the written materials to enable him to transmit the notice to the proper address; and his stamp is then made evidence that he has got from the objector the proper instructions to enable him to effect such transmission. In no part of the section can I find any words importing that the direction

given by the objector to the postmaster with the notice is to be written on the same piece of paper as the notice. I see nothing to prevent its being done, as in the present case, by handing to the postmaster an envelope containing externally the direction of the party objected to.

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The case of *Birch v. Edwards* (a) appears to me not to be an authority for the proposition contended for by the appellant, but rather the reverse. There the Court decided that the production of a duplicate containing on the face of it the address, but not having on it any external address, was not a compliance with the corresponding section of the English Act. They held that the duplicate produced by the objector should show what was the direction given to the postmaster with respect to the transmission, and that to show that it should bear an external address. Coltman, J., says, when the statute speaks of a document to be transmitted by the post, "duly directed to the person to whom it is to be sent, it can only contemplate a direction in the ordinary way, written on the "outside;" and Williams, J., "If the notice is to be sent by the "post, it cannot be said to be duly directed for that purpose unless "it also bears an external address." Here the duplicate produced shows what was the direction given to the postmaster with respect to the transmission of the notice. By that the proof is complete on the part of the objector; and I do not think that proof is displaced by production of the actual instructions respecting its transmission, actually given to the postmaster in writing, along with the notice, and exactly corresponding with the endorsement on the duplicate, merely because they are written on an envelope, containing the notice intended for transmission.

FITZGERALD, B., concurred with DEASY, B.

FITZGERALD, J.

It seems to me that the decision of the Court below was erroneous, and ought to be reversed. The objector was bound to prove that he had "given, or caused to be left at the place of abode of the party objected to, a notice of objection," &c.; and

(a) 5 C. B. 45.

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Erech. Cham.
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he might do so by evidence of actual delivery, or in the manner prescribed by the 113th section of the statute. He selected the latter course; and, as I understand the case stated for the purposes of this appeal, the Revising Chairman held that the notice of objection, stamped with the post-office stamp, and the notice and envelope actually transmitted by post, were duplicates, within the meaning of section 113; and so that the provisions of the statute had been complied with by the objector. It may be assumed that the production by the objector of the stamped duplicate notice is evidence of its having been delivered in the ordinary course of post, and that, if the provisions of the statute have been duly complied with by the objector, the party objected to cannot defeat the objection by showing that, through the default of the post-office or otherwise, the notice did not reach him in due time. But it seems equally clear that, if the objector has not substantially complied with the provisions of section 113, he cannot rest his case on the production of the stamped duplicate, and must give evidence of actual service or actual delivery of the notice. The question then seems to be, whether, on the facts stated in the case, the objector complied in substance with the provisions of section 113? It seems to me that the two notices to be presented to the post-office should be each an original, signed with the hand of the objector, duly directed with a direction written on the outside, and should be identical in all essentials.

The form of notice of objection given in schedule B, No. 15, does not contain any address or direction, because it is to be actually given to, or left at the place of abode of, the party; but when the objector seeks to avail himself of section 113, then the address and external direction becomes a part of the notice, and, as observed by Mr. Justice Maule, in *Birch v. Edwards* (a), "a most essential part of the notice."

Let us now refer to the language of section 113, for the question depends entirely on its interpretation:—"And whenever any person shall be desirous of sending any such notice of objection by the post, he shall deliver the same duly directed, open, and in dupli-

(a) 5 Com. B. 45.

"cate, to the postmaster of any post-office where money orders
 "are received or paid, within such hours as shall have been pre-
 "viously given notice of at such post-office, and under such
 "regulations with respect to the registration of such letters; and
 "the fee to be paid for such registration; which fee shall in
 "no case exceed twopence over and above the ordinary rate of
 "postage as shall from time to time be made by the Postmaster-
 "General in that behalf: and in all cases in which such fee
 "shall have been duly paid, the postmaster shall compare the
 "said notice and the duplicate; and on being satisfied that they
 "are alike in their addresses and in their contents, shall for-
 "ward one of them to its address by the post, and shall return
 "the other to the party bringing the same, duly stamped with
 "the stamp of the said post-office." When the statute directs
 that "he shall deliver *the same* duly directed, open, and in
 duplicate, to the postmaster," the manifest interpretation ap-
 pears to be that the notices to be so delivered shall be originals,
 each signed by the objector; each externally and duly directed
 and open, not only for the purposes of comparison, but so as to
 indicate the nature of the document. When the notices are pre-
 sented to the postmaster, he may select either of the two for
 stamping—[see *Toms v. Cuming* (a)]—and transmit the other.
 In the case before us, he selected and stamped the notice, which
 was duly directed by an external direction on the same paper;
 but the matter transmitted by post consisted of two papers, viz.,
 an undirected notice not containing on any part of it the address
 or direction of the party for whom it was intended, and an envelope
 having on it the name and address of the appellant. In my opinion,
 the notice kept for transmission was not a duplicate of the other,
 within the true meaning of section 113, and is not made so by
 the addition of the directed envelope. I have founded my opi-
 nion on the plain language and obvious meaning of section 113:
 and if it was necessary, many substantial reasons could be assigned
 why the Legislature intended that the name and address of the
 party to whom the notice was to be transmitted should be on

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Esch. Cham.
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(a) 7 M. & G. 88.

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the same paper as the notice, and not on a separate paper. It will be observed, on referring to section 113, that the notice is not only to be *open*, but is to have the character of a registered letter—*i. e.*, a letter in respect of the correct delivery of which the post-office authorities take special precautions. It seems to lose that character if, in place of being left open with the proper direction on it, the notice is to be inclosed in another paper or envelope, and have thus nothing to distinguish it from an ordinary post-letter. The distinction will better appear on referring to the very documents now before us.

The inspection of these documents suggests a consideration to test the validity of the argument for the respondent, *i. e.*, the two notices to be presented to the postmaster should be of that character that he may indifferently select either to be the stamped duplicate. Now, if in the present case he had selected the notice contained in the envelope as the one to be retained, whether should he stamp the notice or the envelope? To stamp either would be insufficient; and if, to obviate the difficulty, he affixed the stamp to both, no connection would appear to exist between them, unless supported by verbal proof that the notice was contained in the envelope at the time of stamping.

It seems to be safer to hold that the statute should be complied with, by having the direction and address of each notice on the same paper. It was urged in the course of the argument that the statute makes the production of the stamped copy evidence of the notice having been given to the person objected to "*at the place mentioned in such duplicate*;" but that does not make it conclusive in the sense of precluding the party from showing that the statute has not been followed—as, for instance, by producing the copy transmitted, and showing that it either had no direction at all, or had a direction different from that on the stamped duplicate. *Toms v. Lucking*, seems to show that the party may rely on proof that the two notices were not duplicates.

Again, it was urged that the *prima facie* proof of service by the production of the stamped notice was not displaced, as it sufficiently appeared that the notice transmitted by post had in fact reached

the party; but the Chairman did not act on that view, nor could he in fact do so, for it appeared on the production of the envelope, by a post-office endorsement, that the party objected to was not known at the place of address.

My opinion on the whole is, that where the objector has complied with the provisions of the statute, he is not responsible for the delays of the post-office, but that he is not entitled to rely on section 113, if it is made appear he has not in substance complied with its provisions.

O'BRIEN, J., HAYES, J., and HUGHES, B., concurred with FITZGERALD, J.

Appeal allowed.

M. T. 1864.
Exch. Cham.
WYNNE'S
CASE.

CARROLL, *appellant*; WALLACE, *respondent*.*

THIS was an appeal from a decision of the Chairman of the County of Wicklow, made at a revision of the list of voters for that county in October 1864.

The retention of the name of the respondent upon the list of voters was duly objected to.

In the list of voters objected to the following entry appeared:—

Christian-name and surname of each Person objected to.	Place of Abode.	Nature of the supposed Qualification (if Registered.	Townland or Denomination, Street, Lane or other place in this Barony, and number of House (if any) where the Property is situate, or name of the Property, or name of the Tenant (if any); or, if the Qualification consist of a Rentcharge, then the names of the Owners of the Property out of which such Rent is issuing, or some of them, and the situation.
Joy, Edward ...	Monaline ...	Freehold. £50	Ballyknocken, Ballinastocken, Tinode, Lacken, Ballinagee, Golden-hill.

Dec. 6.

13 & 14 Vic.
c. 69, ss. 22
and 55.

The sufficiency of a voter's qualification is to be determined by the Chairman. When he is satisfied, no appeal lies; even if the voter have parted with some of the lands in respect of which he was originally placed on the register.

* *Coram* FITZGERALD, B., HUGHES, B., FITZGERALD, J., and DEASY, B.

M. T. 1864.
Esch. Cham.
 WALLACE'S
 CASE.

"It was proved that the respondent had parted with some of those denominations about a year ago, but that he had a freehold interest of £50 in the remaining denominations; the denominations parted with were, Lacken, Golden-hill and Tinode. The appellant thereupon called on me to expunge the name of the respondent from the register. I declined to do so; being of opinion that a sufficient qualification was proved to exist out of the denominations still in his possession."

The *Solicitor-General (J. A. Lawson)* and *P. Keogh*, for the appellant.

When the respondent parted with the three denominations mentioned in the appeal, he ceased to retain the same qualification as described in such register: section 22 of the 13 & 14 Vic., c. 69; *Burton, appellant, Gery, respondent (a)*. He should have sent in a claim to be registered anew, in respect of the lands remaining in his possession. It was the duty of the Chairman to expunge the respondent's name: section 55 of 13 & 14 Vic., c. 69.

J. E. Walsh and *Coates*, for the respondent.

The 55th section of the 13 & 14 Vic., c. 69, provides for the correction of the list of voters, first, by the absolute removal of the voter's name therefrom, and, secondly, by a conditional expungement, at the discretion of the Chairman, if the matters insufficiently described be not supplied to his satisfaction. *Burton, appellant, Gery, respondent*, turned on a franchise unknown in Ireland, viz., a £50 occupation franchise; and the voter in that case had parted with all the property which had constituted his original qualification. If a voter sells fifty out of a hundred acres, is his possession altered; should he serve a new claim?

FITZGERALD, B.

The whole question here is, whether the respondent, under the circumstances, retained a sufficient qualification, so as to entitle him to

remain on the register, under the 22nd section—i. e., had he the qualification required by the Act of Parliament? The sufficiency of that qualification could be determined by service of an objection. The sufficiency was duly questioned in the Court below, and was adjudged by the Chairman to be sufficient; therefore the appeal must be dismissed.

Appeal dismissed.

M. T. 1864.
Exch. Cham.
WALLACE'S
CASE.

CARROLL, *Appellant*; FISHER, *Respondent*.*

Dec. 6.

THIS was an appeal from a decision of the Chairman of the County of Wicklow, made at the revision held for that county in October 1864.—“George Fisher claimed to be placed on the register as a fifty-pound freeholder, in respect of property held for an estate of freehold, and purporting to be devised to him by the will of his father George Fisher. The only evidence of the devise produced for the respondent was a probate in common form from the Court of Prerogative. The appellant contended that the said probate was not sufficient evidence of the right of the claimant to register in respect of said freehold estate. I ruled that the said probate produced was sufficient, and, accordingly placed his name, as a fifty-pound freeholder, on the register. If I was right in point of law, his name is to remain upon the register, and if I am wrong, his name is to be expunged.—J. H. LENDRICK.”

The Chairman is the sole judge of the admissibility of evidence tendered; therefore an appeal, upon the ground that the Chairman had admitted the probate of a will as evidence of a devise, was dismissed.

The *Solicitor-General* (J. A. Lawson) and P. Keogh, for the appellant.

J. E. Walsh and Coates, for the respondent.

This case is ruled by the 78th section of the 13 & 14 Vic.,

* *Coram* FITZGERALD, B., HUGHES, B., FITZGERALD, J., and DEASY, B.

M. T. 1864. c. 69, and *Keys, appellant, Collum, respondent* (a); and no appeal lies upon the admissibility of any evidence.

Exch. Cham.
FISHER'S
CASE.

FITZGERALD, B.

The Chairman is the sole judge of the admissibility of the evidence. The question as to whether there was any evidence or not has not been reserved.

There is no question of law in this appeal to be decided by the Court.

Appeal dismissed.

(a) 7 Ir. Com. Law Rep. 385.

CARROLL, *Appellant*; BEGGS, *Respondent*.*

Dec. 6.

The heading of the first column in the form of claim No. 9, schedule A, 13 and 14 Vic., c. 69, runs, "Christian name and surname of the applicant at full length."—*Held*, that "Nathl. Beggs" sufficiently identified Nathaniel Beggs as the claimant.

THIS was an appeal from a decision of the Chairman of the County of Wicklow, made at the revision of the list of voters for that county in October 1864.

"Nathaniel Beggs claimed to be put upon the register; his claim" (schedule A, No. 9) was as follows:—

Christian-name and surname of the Claimant at full length.	Place of Abode.	Nature and amount of Qualification.	Townland, &c., &c.
Nathl. Beggs	Main street, Bray	Leasehold, £20	Main street, Bray.

The appellant objected to the respondent's claim, on the ground that his christian-name was not set out at full length. The Chairman ruled in favor of the respondent, and placed his name on the register.

* *Coram* FITZGERALD, B., HUGHES, B., FITZGERALD, J., and DEASY, B.

The *Solicitor-General* (*J. A. Lawson*) and *P. Keogh*, appeared M. T. 1864.
Exch. Cham.
for the appellant.

The requirements of the statute, and the forms which are incorporated with it (section 118), must be followed strictly; and the respondent should have stated his christian-name at full length.

BEGG'S
CASE.

J. E. Walsh, and *C. Coates*, for the respondent.

While the schedules to the 13 & 14 *Vic.*, c. 69, are part of that Act, the headings of the forms in the schedules to the Act are no part of the Act: *Murphy*, appellant, *Connor*, respondent (a). The 115th section provides a remedy for any misnomer or inaccurate description of any person, place or thing, described in any schedule to this Act.

The respondent signed his name "Nathaniel" in full at the end of the appeal: 58th section.

FITZGERALD, B.

The appeal must be dismissed. The claimant was sufficiently described so as to identify him.

(a) 3 Ir. Com. Law Rep. 203.

CARROLL, *Appellant*; CARMICHAEL, *Respondent*.*

Dec. 6.

THIS was an appeal from a decision of the Chairman of the County Wicklow, *J. W. Lendrick, Esq.*, made at the revision of the voters for that county in October 1864. "The appellant duly proved a notice of objection to the name of the respondent remaining upon the register as a rated occupier. The appellant proved that for the months of July and August last the respondent and his family were not residing in said house, and that another family was there.

Although an appeal be dismissed, the Court will not give costs, if in their opinion there has been a miscarriage in the case.

* *Coram* FITZGERALD, B., HUGHES, B., FITZGERALD, J., and DEASY, B.

M. T. 1864.
Exch. Cham.

CAR-
MICHAEL'S
CASE.

"The appellant thereupon required me to expunge the name of the respondent, which I declined to do. If I was wrong in point of law, his name should be expunged. If I was right, his name should remain thereon."

When the case was called on, the Court said it should be remitted to the Chairman, in order that fuller information might be given as to the non-occupation of the premises by the respondent. Accordingly, the Chairman reported as follows, that "It appeared to me that such absence of the respondent and his family from the said house was temporary, and I considered that the legal occupation thereof by the respondent was not interrupted or disturbed. I declined to comply with the requisition of the appellant to expunge the respondent's name."

The *Solicitor-General* (*J. A. Lawson*), and *P. Keogh*, appeared for the appellant.

The objector was entitled to have the name of the respondent struck off the list, as the latter gave no evidence of his right to be on the list.

J. E. Walsh, and *C. Coates*, for the respondent.

The decision of the Chairman is conclusive on a question of fact. He was satisfied that the respondent had not ceased to occupy.

FITZGERALD, B.

This appeal must be dismissed, but without costs, as we think there has been a miscarriage in the mode in which the case was brought before the Court.

M. T. 1864.
Exch. Cham.

CARROLL, *Appellant*; BARRY, *Respondent*.*

Dec. 6.

THIS was an appeal from a decision made by the Chairman of the County Wicklow, J. W. Lendrick, Esq., at the revision of the list of voters in October 1864. "The respondent claimed to be put on the register as the owner of a £20 rentcharge. The appellant duly proved a notice of objection. The claimant in support of his claim produced a deed executed by R. D. Barry. The deed was dated the 23rd of April 1864, and granted to the claimant a £20 rentcharge upon lands in the barony of Newcastle and county of Wicklow, the subject of the claim, payable half-yearly, from the 25th March then last past; one payment thereof was proved. The appellant contended that the claimant was not proved to have been for a sufficient time the grantee of, or in possession of said rentcharge. I held that he was, and inserted his name upon the register. If I was right in point of law, his name is to remain upon the register, and if am wrong, it is to be expunged therefrom."

2 & 3 W. 4, c. 88, s. 13; 13 & 14 Vic. c. 69, s. 13.

To entitle a claimant to be placed upon the register of voters, in respect of a £20 rentcharge, he must have received some gale thereof, six months previous to the 20th of July, preceding the revision of the list of voters.

The *Solicitor-General* (J. A. Lawson), with whom was P. Keogh, for the appellant.

The 26th section of the English Reform Act (2 W. 4, c. 45) is identical with the 13th section of the Irish Reform Act (2 & 3 W. 4, c. 88). Upon the 26th section of the English Act, it has been decided that "actual possession" in the case of a rentcharge, means a possession *in fact* and not in law. Therefore, the grantor of a rentcharge is not entitled to be registered unless he has been in the actual receipt of it for six months before the 20th of July in each year. *Murray, appellant, Thorniley, respondent (a); Hayden, appellant, The Overseers of Tiverton, respondents (b).*

(a) 2 Com. B. 217; S. C., 1 Lutw. 496.

(b) 1 Lutw. 510.

* *Coram* FITZGERALD, B., HUGHES, B., FITZGERALD, J., and DEASY, B.

M. T. 1864.
Exch. Cham.

BARRY'S
CASE.

J. E. Walsh, and *C. Coates*, for the respondent.

The "actual possession" of a rentcharge is to be computed from the date of the deed creating it. It is an incorporeal hereditament, therefore, "possession" must mean "the right to receive." *In re Taylor (a)*; *Heelis, appellant, Blain, respondent (b)*.

FITZGERARD, B.

This appeal must be allowed, and the respondent's name must be expunged from the list of voters.

(a) 1 C. & D. Cir. Cas. 241.

(b) 5 New Rep. 128.

DICKSON, *Appellant*; CARROLL, *Respondent*.*

Dec. 6.

13 & 14 Vic.
c. 69, s. 55.

A voter whose name appeared upon the registry refused to prove his right to vote on the mere proof of service of a notice of objection upon him. The Chairman thereupon expunged his name. *Held*, that the Chairman had not sufficient evidence before him to warrant his decision.

THIS was an appeal from a decision made by the Chairman of the County Wicklow, at the revision of the list of voters for that county, held in October 1864.

Joseph Dickson, the appellant, appeared on the register of voters as a £20 leaseholder. The respondent proved the service of a notice of objection upon the appellant. The Chairman thereupon called on the appellant to prove his right to have his name retained on the list. The appellant refused, at that stage of the case, to give any evidence save the existing register of voters, in which his name appeared, and on which he relied. The Chairman, J. W. Lendrick, Esq., thereupon expunged the appellant's name.

J. E. Walsh and *C. Coates* appeared for the appellant.

The Chairman had no jurisdiction to expunge the name of the appellant, in consequence of the mere service upon him of a notice of objection. Before he could do so, the 55th section of the

* *Coram* FITZGERALD, B., HUGHES, B., FITZGERALD, J., and DEASY, B.

13 & 14 Vic., c. 69, requires he shall be satisfied that the voter is incapacitated by law or statute from voting.

M. T. 1864.
Esch. Cham.
 CARROLL'S
 CASE.

The *Solicitor-General* (J. A. Lawson) and P. Keogh appeared for the respondent.

FITZGERALD, B.

This decision must be overruled, and the appellant's name restored to the list of voters.

Appeal allowed.

MULDOWNEY, *Appellant*; MALCOLMSON, *Respondent*.*

Dec. 6, 14.

THIS was an appeal from a decision made by the Chairman of the County Carlow, at a revision of the voters list for the borough of Carlow, held in October 1864. "The name of the Reverend Denis Muldowney appeared on the list No. 11 of claimants. It was "proved that on the 20th of July 1864, and for some years previous "thereto, he was the occupier of a house, offices, and garden in "Browne Street, Carlow, of the rated net annual value of £9. It "was further proved that he was not rated as occupier of the said "premises on the last rate, which rate was struck on the 24th of "September 1863, but that his mother, Elizabeth Muldowney, who "then resided in the said house, was rated as occupier in the said "last rate, and that she paid the said rate on or before the 25th of "March 1864; but it was paid by her on behalf of her said son,

13 & 14 Vic.
 c. 69, ss. 5 and
 110.

A occupied premises in a borough, rated at £9, for twelve months preceding the 20th of July 1864. All rates due were paid in his name; his mother however was rated in respect of the premises in the then last rate, struck in September 1863. He served a notice of claim to be registered in respect of the premises on the 4th of August, and a notice of objection to his claim was served upon him on the 20th of August. A presented a claim to be rated in the rate-book for September 1863, to the Guardians of the Union, on the 31st of August. Held, that A was entitled to be placed upon the register, and that the fact of his claim to be registered having been objected to before he claimed to be rated was immaterial, as the effect of the latter claim was to qualify him by relation on the 20th of July preceding: *Agnew, appellant*; *Kelly, respondent* (2 Ir. Com. Law Rep. 560).

* *Coram* FITZGERALD, B., HUGHES, B., FITZGERALD, J., and DEASY, B.

M. T. 1864. *Exch. Cham.*
**MALCOLM-
 SON'S CASE.**

"by whom it was expressed to have been paid in the receipt given
 "to her by the poor-rate collector. It was further proved that the
 "Reverend Denis Muldowney, on or before the 4th of August 1864,
 "served the usual notice of claim upon the Town-clerk of the said
 "borough, claiming to be registered as a voter in respect of the
 "said premises. It was further proved that the notice of objection
 "to the name of the said Rev. D. Muldowney, by the respondent,
 "was duly served. It was further proved that the said Rev. D.
 "Muldowney, on the 31st of August 1864, duly presented to the
 "Guardians of the Union a claim in writing, claiming to be rated
 "in respect of the said house, offices, and garden, in the said last
 "rate, which was so struck as aforesaid, on the 24th of September
 "1863. Having regard to the 55th section of the 13 & 14 Vic., c.
 "69, I held this claim to be rated was made too late, and that it
 "was not proved that the said Rev. D. Muldowney was entitled on
 "the 20th day of July 1864 to have his name inserted on the list of
 "voters No. 11, in respect of the qualification described in such list,
 "and I accordingly expunged his name therefrom. The question for
 "the consideration of the Court is, whether a claim to be rated
 "under the 110th section of the 13 & 14 Vic., c. 69, by an occupier of
 "premises rated for the poor-rate at a net annual value of £8 and
 "upwards, whose name has been omitted from the last rate, is suffi-
 "cient in point of law, if it is presented to the Guardians on the
 "31st of August, and after due service of objection upon him. If
 "such claim is sufficient, the name of the Rev. D. Muldowney is to
 "to be retained, if not it is to be expunged.—T. R. HENN."

C. H. Hemphill, for the appellant.

No particular time is fixed by the 13 & 14 Vic., c. 69, before which the occupier of premises of the net value of £8 should make his claim to the Guardians of the Union, to be inserted in the rate-books. By the 110th section of that Act, the appellant should have been treated by the Chairman as rated in respect of the premises occupied by him.

C. Andrews, for the respondent, cited the 55th, 57th and 58th sections of the 13 & 14 Vic., c. 69, as to the Chairman's powers.

Cur. adv. vult.

FITZGERALD, J.

M. T. 1864.

Exch. Cham.

MALCOLM-
SON'S
CASE.

The question in this case is as to the right of the appellant to be registered as a voter for the borough of Carlow, pursuant to a notice of claim served by him on the 4th of August 1864. The claim was made as the occupant of certain tenements in Brown-street, Carlow, which are rated to the poor at a net annual value of £9. The appellant was, for more than twelve months before and on the 20th of July 1864, the occupier of those tenements; he had, before the 1st of July 1864, paid all poor-rates payable in respect of those tenements previously to the 1st of January 1864. The alleged defect in his title to be registered is, that he was not the person rated to the poor in respect of those premises. This defect was alleged at the Sessions in October 1864 by the respondent, who had duly served his notice of objection on the 20th of August 1864, which is the last day allowed for giving such notices by the 13 & 14 *Vic.*, c. 69. By the 5th section of that Act, it is enacted that "every male person who shall occupy "as tenant or owner, within any borough in Ireland returning a "member or members to serve in Parliament, any lands, tenements, "&c., and shall be rated under the last rate for the time being "(under the Poor-law Acts), as occupier of such tenements, at a net "annual value of £8 or upwards, shall, if duly registered under "the statute, be entitled to vote . . . provided that no such "person shall be registered in any year unless he shall have been "such occupier for the space of twelve calendar months next before "the 20th day of July in such year; and shall, on or before the 1st "day of July in such year, have paid all poor-rates in respect of "such premises, which shall have become payable from him in "respect of such premises previously to the 1st day of January "in such year." It is obvious then, from the facts stated, that the only defect in the appellant's title was the not being the person rated in respect of the premises occupied by him. It is equally clear that, assuming those facts to be true, he ought to have been so rated under the last rate made, which was in this case on the 24th of September 1863.

Now, the 110th section of the 13 & 14 *Vic.*, c. 69, enacts that

M. T. 1864.
Exch. Cham.
 MALCOLM-
 SON'S
 CASE.

"It shall be lawful for any person who shall occupy any lands, tenements, &c., rated under the Poor-law Acts, at a net annual value of £8 or upwards, in any borough in Ireland in which there shall be a rate for the relief of the poor, and whose name shall have been omitted from such rate, to present to the guardians of the union a claim to be rated in respect of such premises; and upon such occupier so claiming, and actually paying or tendering the full amount of the rate or rates (if any) then due in respect of such premises, the guardians of the union shall insert the name of such occupier in such rate, in respect of such premises aforesaid." It seems clear that under this section the appellant was entitled to present his claim to the guardians to be rated in respect of the premises occupied by him, and that it was their duty to insert his name in the rate. No time is fixed by the Act for making such claim. The guardians have nothing to do with the claimant's right to vote; nor indeed is the section confined to boroughs returning a member or members to Parliament. Now, the appellant did present such claim to be rated under the last rate before the 25th of August 1864, and before the Revising Sessions held in the October of that year; but his name was not inserted by the guardians in the rate. Still therefore he was not the person rated at the time of the Sessions. But the 110th section further provides that:—"In case such guardians shall neglect or refuse so to do, such occupier shall, for the purposes of this Act, be deemed to *have been* rated in respect of such premises, in the rate in respect of which he shall have claimed to be rated as aforesaid." In this case then the appellant, who had been the occupier of premises rated to the necessary annual value, for more than twelve months before the 20th of July 1864, and who had, before the 1st of July in that year, paid all rates due, and had presented his claim to be rated in respect of the rate made in September 1863, and had been refused, was at least *prima facie* to be deemed to *have been* rated in respect of the premises in respect of that rate, for the purposes of the Act. It is said, however, that the Chairman ought not, at the Revising Sessions in October 1864,

so to have deemed him, because his claim to be rated was not made until after the 20th of August 1864, when the objection to his claim to be registered as a voter was given, and which day was the last on which such objection could be given. Nothing certainly is expressly stated in the Act of Parliament as to the time when such claim to be rated must be made; but, when made and refused, the Act puts the party in the same condition as if he had been rated. And *Reilly's case* (a) establishes that the effect of the claim to be rated by the occupier is to qualify him, so far as rating is concerned, by relation. If that case be rightly decided—and I am not prepared to say it is not—it seems to me to rule this. To distinguish that case, it was said that the claim to be rated was made there before objection taken to the claim to be registered, and previous to the last day for taking objections. It does not appear from the case that the claim was made before objection taken; and it is clear that the Court decided on no such distinction as that suggested. Chief Justice Monahan, in delivering the judgment of the Court, deals with the very matter now relied on: he numbers, as one of the objections to the decision of the Court, which he overrules, that by the Act of Parliament a certain day is named for the service of notice of objection; and it is said it would be strange to hold that a person could be allowed to be rated after the time for objecting to his name had expired.

The question before us is therefore closed by authority; and the decision of the Chairman must be reversed.

Appeal allowed.

(a) 2 Ir. Com. Law Rep. 560.

M. T. 1864.
Exch. Cham.
 MALCOLM-
 SON'S
 CASE.

M. T. 1864.
Exch. Cham.

O'BRIEN, *Appellant*; FENTON, *Respondent*.*

Dec. 6, 7, 14.

13 & 14 *Vic.*,
 c. 69, ss. 22,
 23, 55.

A notice of
 claim need not
 be signed by
 the claimant
 personally.

THIS was a consolidated appeal from a decision of the Chairman of the County of Wicklow, made at a Revision of the Voters of that county in October 1864.

"John Brien was produced in Court, and claimed to be placed upon the register as a rated occupier. The claim was produced in open Court; and it was proved that it was not signed by the claimant; and there was no evidence that it was signed by his authority. The respondent thereupon required me to reject the claim, which I accordingly did. If the Court be of opinion that I was wrong in point of law, the names of the claimants are to be inserted; if I be right, their names are not to be inserted.—J. W. LENDRICK."

P. Keogh, with whom was the *Solicitor-General* (*J. A. Lawson*), for the appellant.

A notice of claim need not be signed by the claimant himself: *M'Niffe*, appellant, *M'Ternan*, respondent (a). The Chairman can inquire into the claimant's qualification only. The validity of the notice of claim comes under the jurisdiction of the Clerk of the Peace: *Hughes*, appellant, *Barnett*, respondent (b). The claim when published must be assumed by the Chairman to be correct; and it is sufficient under the English Voters Act (6 *Vic.*, c. 18) if it be signed in the claimant's name: *Davies*, appellant, *Hopkins*, respondent (c).

Coates (with whom was *J. E. Walsh*), for the respondent.

This Court has no jurisdiction to entertain this appeal; for

(a) 3 *Ir. Com. Law Rep.* 186.

(b) 3 *Ir. Jur.*, N. S., 244.

(c) 1 *Ke. & Gt.* 118; *S. C.*, 27 *Law Jour.*, C. P., 6.

* *Coram* FITZGERALD, B., HUGHES, B., FITZGERALD, J., and DEASY, B.

the question here is, whether the Chairman acted *ultra vires*—not whether his decision was right or wrong: *Neville, appellant, Hamilton, respondent* (a). But if this Court has jurisdiction, then how can the Chairman, under the 56th section of the 13 & 14 Vic., c. 69, “finally determine upon the validity of such claims and objections,” &c., &c., unless he inquires into the signatures of the claims, which, by the 48th section, are to be laid before him? The claimant should sign the claim personally: *Toms, appellant, Cuming, respondent* (b).

M. T. 1864.
Esch. Cham.
FENTON'S
CASE.

The *Solicitor-General*, in reply.

The Chairman can examine into the validity of claims to be put on the register only when the words “objected to” appears opposite the name of the claimant (section 23). But when the claimant is on the list, the Chairman can only examine into the *qualification* of the claimant (section 55). The appellant, by his appearing to support his claim, ratified retrospectively the signature of his name to it: *Machan v. Dunn* (c); *Broom's Legal Maxims*, p. 775.

FITZGERALD, B.

We are of opinion that this case is ruled by that of *Davies, appellant, Hopkins, respondent* (d), and by the cases which followed that decision in this country.

Dec. 14.

Appeal allowed.

(a) 3 Ir. Jur., N. S., 145.

(b) 7 M. & G. 77, 88.

(c) 4 Bing. 722.

(d) 1 Ke. & Gt. 118; S. C., 27 Law Jour., C. P., 6.

M. T. 1864.
Exch. Cham.

Dec. 7.
 H. T. 1865.
 Jan. 12.

DOWNING, *Appellant*; MORPHY, *Respondent*.*

2 & 3 W. 4,
 c. 88 (Reform
 Act) ss. 9 and
 13.

The 9th section of the Reform Act preserved the right of voting to freemen and all persons entitled on the 31st of March 1831 to vote, by reason of any corporate or other right, and to all persons who, by reason of birth, marriage or service, should at any time thereafter be admitted to their freedom in any city, town or borough.

Therefore, free burgesses elected after the passing of the Reform Act, although resident, do not acquire a right to vote. —[FITZGERALD, B., *dis-sentiente*].

THIS was an appeal from a decision made by the Chairman of the County of Kerry, at the revision of the List of Voters for the borough of Tralee.

“The names of T. Blennerhasset, G. Gun, and P. Chute, appeared on the list of persons entitled to vote as free burgesses at the election of a Member for said borough; and notices of objection having been duly served upon the said several parties by F. C. Downing, whose name appears in the list of voters for said borough, on behalf of the objector it was urged that I should expunge the names of the said three several parties from the list of persons entitled to vote at the election of a Member to serve in Parliament for the said borough of Tralee, on the ground that their only claim or right to have their names retained on said list depended upon their admission as such free burgesses, as hereafter set forth: that said several admissions took place after the passing of the 2 & 3 W. 4, c. 88; that they were so admitted, not by reason of birth, marriage or service, or any statute in force at the time of the passing of said Act; that therefore they never became legally entitled to vote at the election of a Member to serve in Parliament for the said borough; and that no subsequent proceedings did or could set up, or ratify, or confirm a right which in point of law never existed, namely, a right to have their respective names inserted in the list of persons entitled to vote at the election of a Member to serve in Parliament for said borough of Tralee. In sustainment of the right of the said voters, evidence was laid before me that the town of Tralee

* *Coram* HAYES, J., FITZGERALD, B., HUGHES, B., FITZGERALD, J., and DEASY, B.

"was incorporated by royal charter of King James the First, under
"the name of 'The Provost and Free Burgesses of the Borough of
"Tralee,' to consist of a provost and twelve free burgesses, to whom
"was granted the sole right of returning Members to Parliament
"for the said borough. The burgesses were elected for life, with
"power to the surviving burgesses to fill vacancies which might
"occur from time to time; no peculiar qualification being required
"for such burgesses by reason of birth, marriage or service. The
"burgess-roll of said borough was produced before me, by which it
"appeared that T. Blennerhassett and G. Gun were respectively
"admitted free burgesses of said borough on the 6th of June 1835,
"and that P. Chute was admitted a free burgess on the 24th of
"June 1836; and it further appeared by said roll that the said three
"several parties took the oaths, and signed the roll; and it further
"appeared by the certificates respectively attached to said several
"admissions that the stamp duties respectively payable by the said
"parties were duly paid; and said certificates further certified that
"said several parties were admitted by grace especial. It further
"appeared that search had been made for the corporate book con-
"taining the record of the proceedings of the corporation of Tralee,
"and that same could not be found. It further appeared that the
"said several parties continued to reside, and now reside within
"seven statute miles of the usual polling place of said borough, and
"that they had been duly registered, from seven years to seven
"years, as entitled to vote for a Member of Parliament for said
"borough under the Act of the 2 & 3 *W.* 4, c. 88, and that on each
"occasion of such registration, they respectively swore to residence
"within seven statute miles of the usual polling place of said
"borough; and it also was proved that they have been likewise
"duly registered under the 13 & 14 *Vic.*, c. 69, and that their
"names are on the current register of voters for said borough. I
"held such evidence to be sufficient; and I declined to expunge the
"said several names of T. Blennerhassett, G. Gun, and P. Chute,
"and retained same upon the list of voters for the said borough of
"Tralee. If I was right in so deciding, the names of the said

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 "list of voters for the said borough of Tralee; but, if I was wrong
 "in so deciding, the said three names are to be expunged.—
 "D. R. KANE."

The *Solicitor-General (J. A. Lawson)* Serjeant *Sullivan*, and
J. C. Neligan, for the appellant.

Free burgesses are not exempted in the 9th section of the Reform Act (2 & 3 *W.* 4, c. 88); nor are they mentioned in the form No. 9, schedule C, to that Act. A free burgess is an honorary freeman, within the meaning of that section, for he is not admitted by birth, marriage or service; and "burgess" is synonymous with "freeman:" *Williams v. Evans (a)*; *Gale, appellant, Chubb, respondent (b)*.

C. Andrews and *W. Kaye*, for the respondent.

Free burgesses are entitled to vote, and are not disfranchised by the Reform Act (2 & 3 *W.* 4, c. 88): *Molyneux's case (c)*; *Tottenham's case (d)*. The 55th section of the Reform Act declares that all laws and usages then in force, save so far as they are expressly repealed, shall remain in force. The policy of the Reform Act was not to curtail, but to enlarge the franchise: *Glennon's case (e)*. If both the Reform Act, and the 13 & 14 *Vic.*, c. 69, can stand together, the latter does not repeal the former: *Mahony v. Wright (f)*. Free burgesses belong to the class of persons whose rights are preserved by the 9th section of the Reform Act, which provides "that all freemen, freeholders, and persons who, by reason of any corporate or other right, are now by law entitled to vote," &c. &c., shall enjoy such right of voting. "Persons" there means "class:" *Gaydon, appellant, Bancroft, respondent (g)*. The respondents all reside within seven miles of the borough of Tralee. The Legislature

(a) 8 Term Rep. 246.

(b) 4 Com. B. 41.

(c) Alc. Reg. Cas. 19.

(d) 2 Ir. Com. Law Rep. 572.

(e) Alc. Reg. Cas. 81.

(f) 10 Ir. Com. Law Rep. 420.

(g) 5 New Rep. 88.

distinctly contemplated the preservation of the rights of both free-men and free burgesses.

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Serjeant *Sullivan*, in reply.

Molyneux's case is not entitled to much weight. The cases reported in *Alcock's Reports*, were merely "moots" amongst the the Judges; Counsel were not heard at them. Those decisions were not binding on the Judges of Assize; and the late Baron Richards, when refusing to follow the decision of the majority of the Judges, declares that the Twelve Judges had neither original nor appellate jurisdiction on the subject of the registry (a). The attention of the Court does not appear to have been called to the 13th section of the Reform Act. The Reform Act was aimed at freemen and free burgesses. "Persons," in the 9th section of that Act, is synonymous with "individuals." *Tottenham's case* was not argued by Counsel on both sides.

HAYES, J.

In the cases of *Proctor v. Lane*, and *Howlett v. Tottenham*, this Court has held that non-resident burgesses are not entitled to vote. The question now is, whether resident burgesses are in a better condition? In my opinion they are not. Let us briefly consider the sections of the Reform Act bearing on the subject. By the 7th section, a wholly new class of voters was introduced, familiarly known as the £10 leaseholders. If the Legislature had stopped with that section, all pre-existent rights and franchises would have remained as before. But it is plain that it was not the intention of the Legislature merely to add a new franchise, leaving the former franchises untouched. They also were to be regulated and restricted. Accordingly we find that the next two sections are introduced by way of proviso or saving, not out of the previous legislation, but out of the implication from the previous legislation. The 8th section deals with the small freehold franchise. It prohibits any person whatever acquiring it after the passing of the Act, and very much restricts it as to those who had already acquired it since the 1st March 1831.

(a) *In re Feighney*, Walsh's Reg. Cas. 166; *Alcock's case*, ib. 172. 193, 199.

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The statute in the 9th section discusses the corporate franchises, and by way of proviso or saving from the large and general privileges theretofore enjoyed, enacts first, that all freemen and persons who by reason of any corporate or other right are *now, i. e.*, at the passing of the Act, entitled to vote at borough elections, and secondly, all persons, who, by reason of birth, marriage, or service, or any statute now in force, should be at any time thereafter admitted to their freedom should, so long only as they should reside within seven miles of the borough enjoy their right of voting unaffected by the Act. Thus a restriction was imposed on those persons who at the time of the passing of the Act had a vested interest in, and had actually acquired the franchise, and also on those who under certain favored circumstances should afterwards acquire it, those circumstances giving them what has been called an inchoate claim of right. With respect to those who should after 1st March 1831 be made honorary freemen, they were absolutely and under all circumstances deprived of the elective franchise. Such is the scope of the 9th section. Being disposed to think that for the true interpretation of this statute we ought to consider burgesses not exactly as equivalent to freemen, but as persons who formed a class which, by reason of a corporate right, were at the time of the passing of the Reform Act, and if it had not passed would have continued to be, entitled to vote,—it appears to me that the Act has in the 9th section dealt with only one portion of the class, viz., those persons who at the time of the passing of the Act had been admitted burgesses, and so were entitled to vote. It says nothing as to all the other persons who should thereafter become members of the class. But the Legislature does not so leave it; for after discussing in the next following three sections several other matters not connected with the matter before us, it returns to it in the 13th section, and it there enacts that “no person shall be admitted to vote” in any future Parliamentary election for a borough, “unless such person shall have been qualified as aforesaid, and duly registered.” The force of these negative words then is, in my opinion, to disfranchise all persons, save those whose rights were specially saved in the 9th section, and as there restricted. On these grounds, I am of opinion, that burgesses elected and

admitted after the Reform Act, even though resident within the statutable distance, did not thereby acquire a title to vote.

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HUGHES, B., FITZGERALD, J., and DEASY, B., concurred.

FITZGERALD, B.

The question in this case was considered by the Twelve Judges, in *Molyneux's case* (a), and the view of the law then taken by them has been, I believe, acted on ever since, and seems to me to be assumed as correct in such cases as *Tottenham's case* (b).

I do not feel myself at liberty, whatever opinion I might otherwise be disposed to form, to overrule a decision acted on for thirty years, during fourteen of which this Court has been in existence, and at least recognised, if not formally affirmed by it.

I think, therefore, that in conformity with what was decided thirty years ago to be law, and with what has been acted on as law ever since, the decision of the Chairman ought to be affirmed.

Appeal allowed and names expunged.

(a) Alc. Reg. Cas. 191.

(b) 2 Irish Com. Law Rep. 572.

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21.
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A, a licentiate apothecary, covenanted to instruct B. in his art and mystery of apothecary, in the best ways and means he could. B having sued A for a breach of this covenant, proved at the trial that at the time of the execution of the indenture of apprenticeship A kept an open shop for the compounding of the prescriptions of other medical practitioners as well as his own, but that he afterwards closed the shop to the public, and used it merely for the purpose of compounding medicines for his own practice, and ceased to be registered as apothecary in the Medical Register.

Held, that A did not thereby become disqualified from teaching B pursuant to his covenant, so as to entitle the latter to a direction that A had broken the covenant.

THE first count of the summons and plaint stated, that by an indenture of apprenticeship, bearing date the 28th day of November 1859, the plaintiff put himself an apprentice to the defendant, to learn his art and mystery as an apothecary, and with him, after the manner of an apprentice, to dwell, and serve from the 9th day of November 1859 until the full end and term of five years. And the defendant in consideration, &c., agreed to teach him his said art and mystery. That the said defendant thereby covenanted with the plaintiff to instruct him in his (the defendant's) said art which he used, in the best ways and means which he could. That the said consideration was duly paid to the defendant, and after the making of the said indenture, the plaintiff entered into the said service of the defendant, and always performed all things in said indenture contained on his part to be performed. Yet the defendant, after the making of the said indenture, and during the said term, that is to say, for a long time previously to the 21st day of July 1862, did not nor would instruct the plaintiff in his the defendant's said art, to the plaintiff's damage, &c.

Defences:—First, that the indenture of apprenticeship was not the deed of the defendant. Secondly, that since the making of the said indenture, the defendant had been always ready and willing to instruct the plaintiff in the defendant's art, in the summons and plaint mentioned, and did so instruct him, until the plaintiff, without the consent of the defendant, and contrary to the defendant's will, withdrew from the service of the defendant as such apprentice.—Issues thereon.

The case was tried before MONAHAN, C. J., during the sittings after Hilary Term 1863.

It appeared that the plaintiff went to reside with the defendant in the month of November 1859, for the purpose of learning the art of an apothecary, and on the 28th of the same month, the indenture of apprenticeship mentioned in the summons and plaint was executed. At the time when the plaintiff went to reside with the defendant, the latter kept an open shop for the sale of medicines, and was in the habit of making up the prescriptions of other physicians; but a few months after the execution of the apprenticeship deed, the defendant closed his shop, and from that time ceased to sell medicines, or make up the prescriptions of other medical men. It also appeared that he gave orders not to admit the inspector appointed under the 1 G. 3, c. 34, s. 7 (*Ir.*), to inspect his shop or medicines, and that he did not compound his drugs according to the Pharmacopeia. Medical evidence was given on the part of the plaintiff to prove that the keeping of a shop was an essential part of the business of an apothecary. On behalf of the defendant several medical witnesses were examined, who, from an inspection of the defendant's books, proved that he had a large business as a general practitioner, attending and prescribing for patients; and that in this respect the defendant had afforded the plaintiff ample opportunities of learning that branch of the apothecary's business. On cross-examination they stated that keeping a shop was a part of an apothecary's business, but they would not say an essential part; and stated also, that an apprentice could not learn the retail price of drugs where there was no shop; but they thought that a knowledge of the price of drugs was but of small importance to an apothecary. It appeared also that the defendant was not registered as an apothecary in the Medical Register for the years 1861 and 1862, but that he was registered as a Licentiate of the College of Physicians, Edinburgh.

At the close of the case, his Lordship was called on to direct a verdict for the plaintiff, on the following grounds:—

First—That the keeping of an open shop was part of the business of an apothecary; and that the defendant having closed his shop, could not afterwards teach the plaintiff his business, according to the indentures.

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Secondly—That as the defendant had no shop, and was not registered as an apothecary in the Medical Register for the years 1861 or 1862, he ceased in law to be an apothecary, and could not then teach the plaintiff his art, pursuant to the indenture.

This the LORD CHIEF JUSTICE refused to do, and left the entire question on the issues to the jury, who found a verdict for the defendant. His Lordship thereupon reserved leave to the plaintiff to change the verdict into a verdict for him, if the Court above should be of opinion that upon the evidence the defendant had in law ceased to be an apothecary.

Whiteside obtained a conditional order in Easter Term 1863, that the verdict had in this case should be set aside, and a new trial granted, on the grounds that the verdict was against evidence, and the weight of evidence, and of misdirection of the learned Judge; or that the verdict should be set aside, and a verdict entered for the plaintiff, for one shilling, pursuant to leave reserved.

C. R. Barry and *Devitt* showed cause on behalf of the defendant.

Whiteside and *Gamble*, for the plaintiff, in support of the conditional order.

The following cases and statutes were cited and referred to during the argument:—*Apothecaries Hall v. Nicholls* (a); *Hogan v. Somerville* (b); *Apothecaries Co. v. Greenwood* (c); *Apothecaries Co. v. Allen* (d); *Ward v. Ball* (e); *Apothecaries Co. v. Soteriga* (f); *Apothecaries Co. v. Burt* (g); *Thompson v. Lewis* (h); *Apothecaries Co. v. Warburton* (i); *Ellen v. Topp* (k); *Elliott v. South Devon Railway Co.* (l); *Ford v. Lacey* (m); *Allison v. Haydon* (n); *Handy v. Hewson* (o); 1 G. 3, c. 14 (*Ir.*), ss. 7, 11, 12; 31 G. 3, c. 34 (*Ir.*), ss. 18, 22, 23, 24; 55 G. 3, c. 194, s. 5; 20 & 21 Vic., c. 90, ss. 32, 33, 40.

Cur. adv. vult.

(a) 7 Ir. Law Rep. 390.

(c) 2 B. & Ad. 708.

(e) 6 C. & P. 577.

(g) 5 Ex. R. 363.

(i) 3 B. & Ald. 40.

(l) 2 Ex. 725.

(n) 4 Bing. 610.

(b) 7 Taunt. 401.

(d) 4 B. & Ad. 525.

(f) 2 Moo. & R. 495.

(h) 3 C. & P. 483.

(k) 6 Ex. R. 424.

(m) 30 Law Jour., Ex. 351.

(o) 4 C. & P. 110.

MONAHAN, C. J.

This case comes before the Court on showing cause against a conditional order, obtained by the plaintiff, to set aside the verdict had for the defendant below, and to enter a verdict for him, pursuant to the leave reserved by me at the trial.

The question which arose in the case was shortly this:—The action was brought on an indenture of apprenticeship, whereby the defendant agreed to receive the plaintiff as an apprentice, and teach him the art and mystery of an apothecary; and the plaintiff averred in his plaint that the defendant did not nor would instruct him in the said art and mystery; and therefore he claimed damages. The substance of what appeared at the trial was this:—At the time when the plaintiff became the apprentice of Dr. Monks, the latter was what is usually called, in ordinary language, an apothecary; he kept a shop for the sale of medicines; he visited and prescribed for patients himself; and he also made up the prescriptions of other medical practitioners. But it appeared that, some time after the execution of the deed of apprenticeship, the defendant shut up his shop, so far as making up the prescriptions of other medical men, and from that time confined himself to the business which is now recognised as that of a “general practitioner;” that is, he visited every person who chose to send for him; he made up all the prescriptions which he ordered himself: but latterly he did not receive or make up the prescriptions of other physicians.

The defence set up by Dr. Monks was, that he had, since the making of the apprenticeship deed, been always ready and willing to instruct the plaintiff, according to the terms of that deed; and consequently the question to be tried was, whether the defendant was always ready and willing to do so, if this young gentleman chose to receive the instruction. That being the issue, a great body of evidence was given, and a considerable portion of it was directed to the question as to what was the amount of the defendant’s business; and, upon this question, several medical witnesses, who had examined the books of the defendant, stated that they found he had a large business, and that any young man

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residing with him as an apprentice would have ample opportunities of learning the business of an apothecary—more so, perhaps, than with some of the old class of apothecaries, who only made up the prescriptions of other medical practitioners. It was contended at the trial, on the part of the plaintiff, that the mere fact of ceasing to make up the prescriptions of others was ceasing to be an apothecary; and therefore, as the defendant had ceased to be an apothecary, within that rule, I was bound to direct a verdict for the plaintiff; and, accordingly, Mr. *Whiteside* called on me to do so: and this argument was also pressed on me, that when a man undertakes to teach the business of an apothecary, he is bound to continue to practise as an apothecary during the term of the apprenticeship, in the same manner in every respect as he was accustomed to practise at the time of such undertaking. In support of this proposition some cases were cited, to the effect that when a man has two trades, and undertakes to teach an apprentice both of those trades, if he give up one, that would be a violation of the contract, which would entitle the apprentice to damages: and it was contended that such was the effect of Dr. Monks ceasing to keep an open shop. Several sections of the Apothecaries Act (*a*), and of the recent Medical Act (*b*), were cited; and, on the whole case, I thought it right to reserve liberty to the plaintiff to move to have the verdict set aside, and a verdict entered for him; at the same time I left the following questions to the jury—first, whether Dr. Monks had taught the plaintiff everything necessary to enable him to learn the art and mystery of an apothecary; and, secondly, whether he was always ready and willing to do so. Well, on both those questions the jury found in favor of the defendant; they found that the circumstance of this gentleman shutting up his shop, and ceasing to make up the prescriptions of other medical practitioners (some of which might be good, and some bad), did not interfere with the plaintiff learning the business of an apothecary; and they found also that the plaintiff would be competent, with such instruction as the defendant afforded him, to make up the prescriptions of

(*a*) 31 G. 3, c. 34 (*Tr.*).

(*b*) 20 & 21 Vic., c. 90.

other medical men. The only other objection which was suggested to the course of instruction which this young gentleman received was rather a childish one, namely, that he would be unable to read the prescriptions of other persons which he might receive in the course of his business; but, so far from his being deficient in that respect, he appeared an intelligent well-educated person; and this piece of evidence was elicited, that, at the time when he left Dr. Monks's establishment, the fault he found with Dr. Monks was, not that sufficient instruction had not been afforded him, but that he had not been permitted to go as a medical attendant to a nobleman who required a person of that description in his house. The findings of the jury were therefore in my opinion strictly in accordance with the evidence.

As the case therefore now comes before the Court, there is no objection to my charge, except this, that I should have told the jury that the fact of the defendant shutting up his shop prevented him afterwards from teaching the art and mystery of an apothecary, within the terms of the apprenticeship deed. Of course, if I should have done so, the verdict will be set aside, and a verdict entered for one shilling. I reserved the liberty to the plaintiff in that way, because, upon the findings of the jury, I was of opinion that, if there was to be a verdict for the plaintiff at all, it should be for a small sum.

But upon the question now before us, namely, whether the defendant ceased to be an apothecary because he closed his shop, we were referred to the 18th and 22nd sections of the Apothecaries Act (a), and the latter section was most strongly relied on at the trial. [His Lordship read these sections]. There can be no doubt, that if a party open an apothecary's shop in Ireland, without having a certificate from the Apothecaries' Hall, he is liable to a penalty under the 22nd section, and under the 26th section he is also liable to a penalty if he take an apprentice, or practise the art and mystery of an apothecary without a similar certificate. But there is nothing in this Act to show that a man ceases to be an apothecary, because he ceases to make up the prescriptions of other medical men. What

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(a) 31 G. 3, c. 34 (*Ir.*).

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then is an apothecary? An apothecary is a man who attends patients, and makes up prescriptions, either of his own, or those of other medical practitioners. That is the definition of the word "apothecary" given in the case of *Woodward v. Ball* (a). In that case, the action was brought for work and labor as an apothecary, and for medicines supplied; the defence was, that the defendant was not an apothecary prior to the 1st of August 1815, so as to come within the protection of the 55th G. 3. c. 194, s. 20, and that he had not since obtained a certificate pursuant to the provisions of that statute. In that case Williams, J., says: "The practising as 'an apothecary is the mixing up and preparing of medicines prescribed by a physician, or other medical practitioner who prescribes, or the mixing up and preparing of medicines prescribed by the party himself.'"

The case of the *Apothecaries' Hall v. Nicolls* (b) was relied on by the plaintiff; and in that case, which was an action for penalties against a party for having practised as an apothecary without having a certificate from the Apothecaries' Hall, the defendant had been appointed apothecary to a fever hospital, and it appeared that he had never made up prescriptions for the public, but only for the patients in the hospital. A verdict having been taken for the plaintiffs by consent, a conditional order was obtained to change that verdict into one for the defendant; and in support of that order, it was contended that, as the defendant had no shop open to the public, he was not an apothecary, so as to come within the penal sections of the Apothecaries Act; and it was held that, under the circumstances of the case, he had not subjected himself to the penalties imposed by that statute. But that case is no authority for the present, for it is not true that the defendant here had no shop open to the public, he made up prescriptions for every one who came to consult him, and the more of the public who came to him the better pleased he would be. Another case which was referred to, that of the *Apothecaries Company v. Allen* (c), was an action for penalties for practising as an

(a) 6 C. & P. 577.

(b) 7 K. L. 390.

(c) 4 B. & Ad. 625.

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apothecary without a certificate; and it appeared that the defendant did not keep a shop, but that he visited patients, and made up for them the prescriptions which he had ordered himself, but that he did not make up the prescriptions of any other medical practitioner; and it was there held that he had practised as an apothecary so as to subject himself to the penalties imposed by the 55 G. 3. c. 194. In that case the *Apothecaries Company v. Warburton (a)* was relied on, for the purpose of showing that if a party merely make up and administer prescriptions of his own, that is not practising as an apothecary within the meaning of the 55 G. 3. c. 194, s. 26. The case of the *Apothecaries Company v. Warburton* was this:—The action was for penalties, and the defence set up was that the defendant had practised as an apothecary prior to the 1st of August 1815, and consequently that he came within the protection of the 20th section of the 55 G. 3. c. 194. The evidence on the subject was, that previously to that period the defendant had attended several persons, and administered medicines to them, but that he was not able previously to the 1st of August 1815 to make up a physician's prescription, though subsequently to that period he had received sufficient instruction to enable him to do so; and it was held that the defendant could not avail himself of the protection of the 20th section. But in the case of the *Apothecaries Company v. Allen (b)* the Court distinguished the case of the *Apothecaries Company v. Warburton*, and said that though a man who had administered medicines without being able to make up a physician's prescription might not come within the protection of the 55 G. 3. c. 194, s. 20, it did not follow that he did not come within the penal clauses of that statute. The only other case to which I shall refer is the case of *Allison v. Hayden (c)*, which shows the distinction between a surgeon and an apothecary. In that case the plaintiff, who was a surgeon, brought his action for work and labor as a surgeon and apothecary; the defendant disputed certain charges for attendances on him while in a fever, on the ground that the plaintiff was doing the business of an apothecary, without having a certificate;

(a) 3 B. & Ald. 40.

(b) *Ubi supra*.

(c) 4 Bing. 619.

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and on this ground the plaintiff was nonsuited at the trial; and that nonsuit was confirmed by the Court above. There is no doubt that it is part of the business of an apothecary to attend patients, and make up prescriptions; but I never heard that a party was not entitled to be an apothecary unless he was in the habit of making up the prescriptions of other medical men. The remaining objection which was taken at the trial was this, that the defendant was not registered as an apothecary under the recent Medical Act (a). It appears that he was registered as a Licentiate of the College of Physicians of Edinburgh, which is one of the qualifications which entitles a person to be registered under that Act. The only question then is, was it necessary for this gentleman to be registered as an *apothecary*? The provisions of that Act, so far as they relate to the present case are shortly these:—by the 15th section, persons possessed of certain qualifications are entitled to be registered in the manner prescribed by that statute; and by the 32nd section, no person is entitled to recover charges for any advice, attendance, surgical performances, or medicine given, done or supplied by him, unless he be registered. But there is an express provision in the 55th section that nothing in this Act contained should prejudice or in any way affect the rights of duly qualified apothecaries.

We therefore consider the objection taken as the trial untenable, and we are of opinion, upon the whole case, that there is no ground for changing the verdict. The conditional order therefore will be discharged.

(a) 21 & 22 Vic., c. 90.

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TENNANT v. ORR.

May 2, 3.

THE summons and plaint in this case contained three paragraphs. The first stated that a certain firm called "Charles Tennant & Co.," by their bill of exchange, now overdue, bearing date the 2nd day of June 1863, directed to one David M'Kean, required the said David M'Kean to pay to the order of the said firm the sum of £134. 3s. 4d., three months after date thereof; and the said David M'Kean accepted said bill, and the said firm of Charles Tennant & Co. indorsed the same to the defendant, and the defendant indorsed the same to the plaintiff, and the same was duly presented for payment, and was dishonored, whereof the defendant had notice, and did not pay the same. The second paragraph stated that a certain firm called Charles Tennant & Co., by another bill of exchange, now overdue, bearing date the 2nd of June 1863, directed to one David M'Kean, required the said David M'Kean to pay to the order of said firm the sum of £134. 3s. 4d., three months after the date thereof, and said David M'Kean accepted said bill, and said firm of Charles Tennant & Co. indorsed same to the defendant, and the defendant indorsed the same to the plaintiff, and the same was duly presented for payment, and was dishonored; and after the dishonor thereof, and whilst the plaintiff was the holder thereof, under said indorsement, the defendant duly waived and excused notice of said

The defendant gave to the plaintiff the following guaranty:—

"Gentlemen, you will please to credit Mr. A. to the extent of £30 monthly, from time to time, and in default of his not^a paying, I will be accountable for the above amount."

Held, that the words "for the above amount" did not confine the defendant's liability on foot of the guaranty to the sum of £30; but that he was responsible for all goods supplied by the plaintiff to A., to the extent of £30 monthly.

To a summons and plaint containing three counts, the first on a bill of exchange by

indorsee against indorser, averring notice of dishonor; the second on the same bill, averring waiver of such notice; and the third on a guaranty; the defendant pleaded to the first two counts traverses of the above averments, and to the third payment into Court. The jury found for the defendant on the issues on the first two pleas; and they also found that £245. 11s. 10d. was due on foot of the guaranty, over and above the sum paid into Court. It appeared at the trial that the bill had been given on account of the defendant's liability on the guaranty. The defendant's Counsel called on the Judge to direct a verdict for the amount found due on the guaranty, less the amount of the bill; but no application was made to him to amend the pleadings. A verdict was directed for the whole amount found due on foot of the guaranty. On motion to reduce the verdict by the amount of the bill of exchange, or for a new trial, on the ground that the Judge should have amended the pleadings, the Court refused to reduce the verdict, and *Held*, that, as the defendant had confined his defence at the trial to the construction of the guaranty, the Court would not set aside the verdict, for the purpose of enabling him to set up a new defence by his pleadings, namely, that the bill was given in satisfaction of the sum due under the guaranty, and that he had not due notice of its dishonor.

^a *Sic*.

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dishonor, by promising the plaintiff to pay same, but the defendant did not pay same. The third paragraph stated, that it was agreed between the plaintiff, under the style and name of Charles Tennant & Co., and the defendant, that in consideration that the plaintiff would give credit to one David M'Kean, from time to time in the dealings between the said M'Kean and the plaintiff, as in said agreement mentioned, the defendant would guarantee to the plaintiff the amount for which credit should be so given to the said M'Kean, to the extent of £30 monthly, and in default of the said M'Kean paying, would pay the said amount to the plaintiff. And the plaintiff averred, that in pursuance of the said agreement of guaranty he did give credit monthly to the said M'Kean from time to time in the dealings between them, and that the amount for which he so gave credit from time to time to the extent of £30 monthly, during the continuance of the said guaranty, had amounted to the sum of £314. 3s. 4d., but neither the said M'Kean nor the defendant had paid the said sum, or any part thereof.

By the bill of particulars indorsed on the summons and plaint it appeared that the sum of £134. 3s. 4d., claimed under the first and second counts, formed part of the sum of £314 3s. 4d. claimed under the third count.

The defendant pleaded three defences; to the first count, a traverse of notice of dishonor; to the second, a traverse of waiver of notice of dishonor; and to the third, "that the agreement of guaranty therein mentioned was and is in the words and figures following, that is to say:—

"Laurel Hill, August 22, 1862.

"Messrs. C. Tennant & Co.

"Gentlemen,—You will please to credit Mr. David M'Kean of "Hollybrook to the extent of £30 monthly, from time to time, and in default of his not* paying, I will be accountable for the above "amount.—I am gentlemen, your obedient servant,

"JACOB ORR."

"And the defendant brings into Court here the sum of £30 and "says, that the same is sufficient to satisfy the plaintiff's claim, in "respect of the matter herein pleaded to."—Issues thereon.

* Sic.

The case was tried before the Right Hon. the LORD CHIEF JUSTICE of the Common Pleas, at the last Assizes for the county of Antrim.

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It appeared at the trial that the bill sued upon in the first and second counts fell due on the 5th day of September 1863, and was dishonored, but that the defendant got no notice of the dishonor until the 13th September. Evidence was gone into by the plaintiff to prove that the defendant had waived notice of dishonor of the bill. It was admitted that the bill had been given to the plaintiff on account of the defendant's liability under the guaranty to the amount of the bill.

The defendant's Counsel contended that, upon the true construction of the guaranty, the defendant was only liable for £30; and that he was not liable at all on foot of the bill, as he had not received due notice of its dishonor. They also contended that in case the jury found that he had not waived notice of dishonor of the bill, he could not be made liable on foot of the guaranty for the amount of the bill, as it had been passed on account of a portion of the sum due on foot of the guaranty; and the defendant called on the learned CHIEF JUSTICE to direct the jury to that effect. The plaintiff contended, on the other hand, that no such defence was raised on the pleadings; and a discussion then took place as to whether the defendant should be permitted to amend his defence, but as he did not press for an amendment, the pleadings were left unaltered. It also appeared that the drawer of the bill, and the plaintiff who sued as endorsee, were substantially one and the same person. The jury found that the defendant had not received notice of dishonor of the bill, and that he had not waived notice of dishonor. They also found that the plaintiff had supplied goods to David M'Kean, at the rate of £30 monthly, to the amount of £245. 11s. 10d. On these findings having been brought in, the learned CHIEF JUSTICE refused to direct the jury as required by the defendant, but directed a verdict for the plaintiff for £245. 11s. 10d., and at the same time reserved liberty to the defendant to move to have that verdict set aside, and a verdict entered for him, in case the Court above should

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On the 18th of April, in the present Term, *Harrison* obtained a conditional order, that the verdict had for the plaintiff should be set aside, and a verdict entered for the defendant, pursuant to the leave reserved, or that the amount of the verdict should be reduced by the sum of £134. 3s. 4d., the amount of the bill of exchange in the pleadings mentioned; or that a new trial should be granted, on the ground of misdirection of the learned Judge, and also on the ground that he should have amended the pleadings if necessary.

Dowse (with whom was *Falkiner*) now showed cause.

The guaranty set out in the third plea is capable of two constructions: firstly, the one put upon it by the defendant, viz., that in any event the defendant was only liable for the sum of £30; and secondly, the construction contended for by the plaintiff, namely, that the defendant was liable for all the goods supplied to M'Kean, provided they did not in any one month exceed the amount of £30. The learned CHIEF JUSTICE ruled at the trial that the construction put on the guaranty by the plaintiff was the true one. It is contended that that ruling was right. There would be no meaning in the words "monthly," or "from time to time," unless the plaintiff's construction be correct. Instruments of this kind are to be construed strictly; and the words are to be taken most strongly against the party using them: *Hargreave v. Smee* (a). So far as the guaranty is concerned, the bill of exchange is out of the case. The defendant has not pleaded that it was accepted in satisfaction of the debt *pro tanto*, and that no notice of dishonor was given to him; but he contends he has a right to give in evidence those facts under the general issue, whether this sum of £30 was sufficient to satisfy the plaintiff's claim. It is submitted that the effect of the plea of payment into Court is this, that the defendant, while admitting the plaintiff's construction of the guaranty to be correct, says that the sum paid into Court is sufficient to satisfy his demand. To give to that plea any

(a) 6 Bing. 244.

other effect would be opening the door to the general issue. In the case of *Goldy v. Goldy* (a) it was held that where a defendant, to a declaration for goods sold and delivered, pleaded payment into Court, he could not under that plea give evidence of payment or set-off. The defendant should not now be permitted to amend his pleadings, for two reasons: firstly, because the learned CHIEF JUSTICE was not asked at the trial to make the amendment; and, secondly, because, if asked to do so, he should not have permitted the pleadings to be amended in the way proposed by the defendant. It is true there was a discussion on the subject at the trial; but the Judge was not asked directly to amend the pleadings; and no ruling was made on the subject. No case can be found where such an application as the present was granted where no ruling had been made by the Judge at the trial. The amendment which the defendant now asks to be permitted to make is to this effect, that admitting the guaranty covered the amount of the verdict, yet that he had indorsed this bill to the plaintiff in satisfaction *pro tanto* of his liability under the guaranty; and that, by reason of the plaintiff having neglected to give him notice of the dishonor of the bill, he is now discharged from liability under the guaranty to the amount of the bill. That amendment cannot be made without remodelling the whole pleadings; for if that amendment were allowed, while the plea of payment into Court remains on the record, it would be pleading to the very sum admitted to be due by that plea. No doubt it is discretionary with the Court to permit this amendment to be made; but that discretion will not be exercised in favor of the defendant, when the effect of it would be to set up a totally new case, after the defendant has taken his chance of a trial.

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Harrison and M'Blain, contra, in support of the conditional order.

The defendant's construction of the guaranty is the true one, viz., that under it he was only liable for £30 in any event. The plaintiff, in order to support his construction, must read the guaranty as if the words "for the above amount" were left out

(a) 26 Law Jour., N. S., Ex., 29.

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altogether. Those words refer to the previously mentioned sum of £30. Upon the principle on which instruments of this kind should be construed, Bayley, B., in *Nicholson v. Paget* (a), says:—

“Now, this is a contract of guaranty, which is a contract of a “peculiar description; for it is not a contract which a party is “entering into for the payment of his own debt, or on his own “behalf, but it is a contract which he is entering into for a third “person; and we think that it is the duty of the party who “takes such a security to see that it is couched in such words “as that the party so giving it may distinctly understand to what “extent he is binding himself.” And in *Melville v. Hayden* (b), Bayley, J., says:—“A party who takes a guaranty of this sort “should carefully provide that there are words in it expressive “of its being a guaranty for goods to be furnished by him from “time to time.” It is submitted that the rule of construction laid down in those cases is the true one—that it is for the party taking a guaranty of this kind to see that the words are unequivocal and unambiguous. If the defendant be permitted to amend, he will be enabled to rely on any defence he may have to the bill, as an answer *pro tanto* to his liability under the guaranty.

The amendment which the defendant asks the Court to make is one which, in the words of the 231st section of the Common Law Procedure Act 1853, “is necessary for determining the real question between the parties;” for the defendant has several defences to the bill, if he be permitted to rely on them in answer *pro tanto* to his liability under the guaranty. It now appears that the drawer and the plaintiff, who sues as indorsee, are one and the same person. That is a good defence: *Bullen & Leake's Pr. Pl.*, 455 n. Again, it is a good defence that the defendant indorsed the bill to the plaintiff, for or on account of his liability under the guaranty to the amount of the bill, and that the plaintiff neglected to give him notice of dishonor: *Kearlake v. Morgan* (c); *Price v. Price* (d). The latter case also shows that it is not necessary to

(a) 1 Cr. & M. 51.

(b) 3 B. & Ald. 593.

(c) 5 T. R. 513.

(d) 16 M. & W. 232.

aver that the bill was not only given by the defendant, but accepted by the plaintiff, for or on account of the debt. *Peacocke v. Purcell* (a) goes the length of this, that, if a bill of exchange be given as a collateral security for and not in satisfaction of a debt, and if the bill be presented at maturity, and dishonored, and notice be not given of the dishonor, that will discharge the defendant from the original debt; and Erle, C. J., says:—"Though the bill was taken as a collateral security, the plaintiff by his *laches* has marred the bill, as between him and the person from whom he took it; and the effect of his *laches* is, that, as between him and the defendant, the bill has become as money in the plaintiff's hands, and so as much a satisfaction of the claim as if it had been received for and on account of the debt." He cited *Bayley on Bills of Exchange*, 6th ed., p. 368; *Green v. Smithies* (b); *Chitty jun. on Pleading*, 2nd ed., p. 291.

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Falkiner, in reply.

The amendment proposed to be made by the defendant will not assist in determining the real question between the parties. The defendant has made his case on the present pleadings, and taken his chance of a trial; and he should not be permitted to go down again to trial on a totally new case. Mr. Taylor, in his *Treatise on the Law of Evidence*, refers to the case of *Wilkin v. Reed* (c), and adopts the meaning given by Maule, J., to the words, "the real question in controversy between the parties:" at page 188, s. 181, he says—"And lastly, that 'the question in controversy' is in other words the question which both parties really intend to have tried, and not any question which, during the course of the trial, may for the first time be brought into controversy by one of the litigants." This amendment cannot be made while the plea of payment into Court remains on the record. In *Bullen and Leake's Precedents of Pleadings*, p. 564, it is said:—"A defendant will not be allowed to plead any other plea to the same causes of action to which he pleads payment

(a) 14 C. B., N. S., 728; S. C., 10 Jur., N. S., 178.

(b) 1 Q. B. 796.

(c) 23 Law Jour., C. P., 193.

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"into Court; nor can he plead to any allegation which is necessarily admitted by the payment." It is impossible to have in the same record a plea of payment into Court, and another plea going to the whole cause of action; for, suppose to a declaration for goods sold and delivered the defendant pleads payment into Court, and also a traverse or a plea of payment, and the defendant succeeds on either of the latter pleas, what becomes of the money paid into Court? This amendment would not have been made at the trial unless the defendant had given up his construction of the guaranty.

In the third count the plaintiff puts a construction on the guaranty; and the defendant, in answer to that count, does nothing but set out the guaranty in terms, and says that £30, and no more, is due on foot of it. It is well settled that he who pays money into Court pays it in *secundum allegatum*.

On the construction of the guaranty he cited *Hood v. Grace* (a), and *Mumford v. Gething* (b).

MONAHAN, C. J.

The argument of this case has occupied a considerable time; and as there is no probability of our opinion being altered by further consideration, we do not think it necessary to defer giving judgment to another day.

Upon the first question, we are all clearly of opinion that the true construction of the guaranty is, what occurred to me at the trial, that the defendant undertook to be responsible for goods not exceeding £30 a-month, and accordingly that the amount of the verdict was arrived at upon a right principle. Our opinion as to the meaning of the guaranty being clear, we do not think it necessary on this motion to consider with much minuteness whether the rule is that a guaranty should be construed most strongly in favor of the person giving it, or against him. We, however, are disposed to think the true rule is, that the Court is bound to ascertain as best they can what the intention of the parties was, and to construe the document in accordance with that intention. In this case we are

(a) 7 H. & N. 494.

(b) 7 C. B., N. S., 305.

quite satisfied that the intention of the parties was, that the defendant should be responsible for goods supplied to David M'Kean, to the amount of £30 a-month. Upon the other question in the case the matter is a little complicated, but the substance of it is this:—the defendant alleges that, by reason of his not having received due notice of the dishonor of the bill of exchange, he is discharged not only from the bill itself, but also should get credit for the amount thereof out of the sum which would otherwise be due on foot of the guaranty on account of which it was given. It has scarcely been contended that there is on the record any plea or defence to the counts on the guaranty raising this question: there clearly is not. Then it has been suggested that I should have allowed the defences to be amended at the trial, so as to raise this question. In answer to this I may say, as has in fact been stated by defendant's Counsel, no such application was made to me at the trial, in any way, requiring an opinion from me. What occurred was just this:—when I stated my opinion as to the construction of the guaranty, plaintiff's Counsel submitted he was entitled to receive on foot thereof the full sum due, even though the jury should be of opinion the plaintiff was not entitled to recover on foot of the bill of exchange, for want of notice. Defendant's Counsel, in answer, suggested that he should be allowed to amend his defence, and file a new defence raising the question; to which plaintiff's Counsel insisted that, to render such a defence good in point of law, it should be averred not merely that the bill of exchange was given on account of the sum due on the guaranty, but in discharge and satisfaction thereof; and that there was no pretence for such being the case in the present instance. Defendant's Counsel apparently acquiesced in this view of the law, and did not press the application to amend. And the question for our consideration therefore now is, whether at this stage of the case, after verdict, we should allow the defendant to plead a new defence to the count on the guaranty. We do not think we are now called on to decide whether if the defendant had originally pleaded such a defence, he would not have been entitled to succeed thereon; but he having advisedly in answer to the claim on the guaranty, confined his defence to its construction, and insisted merely that his

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liability did not exceed £30, while as a defence to the claim on foot of the bill of exchange, he relied on the want of notice; we do not think that, in the exercise of our discretion, we should at this stage of the case set aside the former verdict, and allow a new defence to be filed, more especially in a case in which, to say the least of it, it did not distinctly, or, perhaps I might say, at all, appear that the defendant was in fact prejudiced by the want of notice of dishonor of the bill by the acceptor, who is of course still liable on foot thereof to the defendant.

We think, therefore, that the verdict should stand for the full amount, and the cause shown be allowed.

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BAYLEY v. THE MARQUIS CONYNGHAM.

An action was brought for the interruption and hindrance of the plaintiff in his fishery, &c., which had been let to him by the defendant by parol for a year. The defendant having traversed the fact of the letting of the fishery to the plaintiff—

Held (CHRISTIAN, J., *dissentiente*), that though an incorporeal hereditament, there was such an agreement by the plaintiff to hold, what

THIS was an action for the disturbance by the defendant of the plaintiff in his enjoyment of certain incorporeal tenements. The first count of the summons and plaint stated that the defendant had let unto plaintiff the Glentees shootings, and a certain fishery, for one year, at a certain rent, and that, before the expiration of said year, he interrupted and hindered the plaintiff from the enjoyment of it. There were other counts varying the statement of the contract. The defendant, amongst other defences, traversed the plaintiff's tenancy. At the trial, at the Sittings after Michaelmas Term 1862, before MONAHAN, C. J., it was proved that, after a correspondence with a Mr. Russell, who was the agent of the Marquis Conyngham, as to the character of the Glentees shootings and fishery of the river Ower, the plaintiff came over to Ireland in August 1861, and agreed with the plaintiff to take the

was equivalent to land, under the defendant, in consideration of a rent for a period not exceeding a year, as would by the combined operation of the 3rd and 4th, sections of the Landlord and Tenant Law Amendment Act (Ireland) 1860 create the relation of landlord and tenant, and that the action was maintainable.

Held, per CHRISTIAN, J., that the 2nd section of the Statute of Frauds, 7 W. 3, c. 12 (*Ir.*), prevented the application of the above Act to the present case, and that the action did not lie.

shooting over 10,000 acres, and Lord Conyngham's part of the fishery of the river, together with the use of a shooting lodge for three months in the year, at a rent of £150 per annum, for three years, with a power of holding them for five. Shortly after, he became dissatisfied with the shooting; and a new verbal agreement was afterwards made that he should hold only for one year, paying a year's rent. The defendant paid half a year's rent in November 1861; he fished till the 30th of September, which was the end of the season; he shot till November; he considered the year to run from the 1st of August 1861 until the corresponding period of the following year. The plaintiff's son-in-law, when he went to fish, was interfered with by the defendant in April 1862. Counsel for defendant, at the close of plaintiff's case, called for a nonsuit, or a direction in his favor, on the ground that the letting relied on could not be made without deed or writing. His Lordship refused so to direct, but reserved leave; and the defendant, having gone into evidence, called a Mr. Russell, who deposed that the agreement was, that the plaintiff should hold the preserve to the end of the season, paying the year's rent; and that when he hindered the son-in-law, he considered that the season had expired. The jury found for the plaintiff, with one shilling damages.

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A conditional order having been obtained to change the verdict into one for the defendant, or for a new trial—

Macdonogh (with him *J. T. Ball*) showed cause against the conditional order.

The 4th section of the Landlord and Tenant Consolidation Act* (24 & 25 *Vic.*, c. 154) applies to incorporeal as well as to corporeal hereditaments. This is manifest from the definition of certain terms in the glossary to the Act. The word "lands"

* 4th section :—"Every lease or contract with respect to lands, whereby the relation of landlord and tenant is intended to be created for any freehold estate or interest, or for any definite period of time not being from year to year, or any lesser period, shall be by deed executed or note in writing signed by the landlord, or his agent thereunto lawfully authorised, in writing."

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is made to include houses, messuages and tenements, of every tenure, whether corporeal or incorporeal; this must be read as if incorporated in the 4th section. Certain contracts therefore, relating to incorporeal as well as to corporeal hereditaments are excepted from the necessity of being under seal. Whenever the relation of landlord and tenant is intended to be created for any freehold estate or interest, or for any period beyond that, if from year to year, a note in writing is necessary—not so for a shorter period. The Statute of Limitations (3 & 4 W. 4, c. 27) shows by its glossary that when the intention of the Legislature is to limit or restrict the construction of the Act, such is expressly stated. A corporation cannot, as a general rule, contract except under seal, yet they can in some instances do so. The title of the Act shows what its object was, “To consolidate and amend the Law of Landlord and Tenant in Ireland.” That was not to limit its operation. If these tenancies from year to year of a fishery be not included within the meaning of the 4th section, it will follow that a fishery may be let for a long period by a note in writing, but not for two days without a deed. An action of trespass will lie for an injury done to a fishery. It may also be made the subject-matter of ejectment.

The following authorities were referred to:—*Finlay v. Bristol and Exeter Railway Company* (a); *Dwarris on Statutes*, 2nd ed., pp. 552 and 567; *The King v. Old Alresford* (b); *Adams on Ejectment*, p. 18; 2 *Chitty on Pleading*, 7th ed., p. 39; *Doe d. Pennington v. Taniere* (c); *Jones v. Reynolds* (d); 2 *Taylor on Evidence*, 806.

Sergeant *Armstrong* and *J. P. Hamilton*, contra.

The 4th section of the present Landlord and Tenant Consolidation Act differs from the Statute of Frauds, in limiting the tenancies to one year, or from year to year, instead of three years, as formerly. The word “tenement” will apply to corporeal as well as incorporeal; but it is not contained in the section under discussion.

(a) 7 Ex. Rep. 416.

(c) 12 Q. B. 1013.

(b) 1 T. R. 361.

(d) 4 Ad. & Ell. 806.

He referred to *The Duke of Somerset v. Fogwell* (a); *Bond v. Higgins* (b); *Arthur v. Bekenham* (c); *Dwarris on Statutes*, p. 568; *Wood v. Leadbitter* (d); *Holford v. Pritchard* (e).

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Ball, in reply.

The glossary and interpretation clause give a key to this Act, and show that the policy of the Act was to assimilate the relation of corporeal and incorporeal; that whatever could create an estate in one should also in the other. It was to remedy defects; for example—if land were given, it might be done by parol; if the right of cutting turf, a deed would be required. The interpretation clause of this Act extends the word “lands” to incorporeal hereditaments, as by the 3rd section the relation of landlord and tenant was intended to be created in respect of incorporeal hereditaments. Upon the true construction of the statute the 4th section was intended also to apply to incorporeal as well as corporeal hereditaments: *Heydon's case* (f); *Warburton d. Loveland v. Ivis* (g); *Beck v. Smith* (h); *Bac. Abr.* tit. *Statute*, p. 459.

Cur. adv. vult.

MONAHAN, C. J.

This case arises upon the construction of the recent Landlord and Tenant Act; and I regret very much that the Court have not been able to come to an unanimous decision. I must say, however, for myself, that I have had great difficulty and much consideration in arriving at the conclusion to which the majority of the Court have come. The action was brought by Mr. Bayley against the Marquis Conyngham, for having disturbed him in the enjoyment of certain shootings and fishings, which it was alleged by the summons and plaint the agent of the Marquis Conyngham had let to him for one year. The summons and

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(a) 5 B. & C. 875.

(c) 11 Mod. 161.

(e) 3 Ex. Rep. 793.

(g) 1 H. & B. 648.

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(b) 2 A. & E. 696.

(d) 13 M. & W. 838.

(f) 3 Rep. 7.

(h) 2 M. & W. 195.

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plaint contained six counts.—[His Lordship then stated the substance of the pleadings.]—Some negotiation having taken place as to certain fishings and shootings on the property of the Marquis Conyngham in the county of Donegal, the plaintiff agreed to take them for a period of four or five years, at a rent of £150 per annum. After some time, Mr. Bayley, finding that the shooting and fishing were not as good as he had expected, made a further agreement with the agent of the Marquis Conyngham, that what was originally a letting for five years should be only for one year from the month of August, for which he should pay a sum of £150. Mr. Bayley paid the sum of £75, leaving the balance unpaid. It appears that before the close of the year the Marquis Conyngham refused to allow Mr. Bayley or his friends to fish on the property in question; and in consequence of that Mr. Bayley brought his action to recover damages against the Marquis Conyngham. The real dispute between the parties was, whether the letting was for a year, or only the unexpired portion of the fishing and shooting season. The jury found that the letting was for a year. The defendant's Counsel submitted that, this being an incorporeal hereditament, the letting relied upon could not have been made without a deed; and, as there was no deed, they called upon me to nonsuit the plaintiff, or direct a verdict for the defendant. I declined to do so, but reserved leave for the defendant to move to have the verdict entered up for him. The question is, whether a right to fish or shoot on the river and lands of a party can be conferred in consideration of a certain rent for one year, unless by deed—whether in fact such an interest can be created by parol? The question is, what is really the effect of the 3rd and 4th sections of the recent Landlord and Tenant Act? In order to come to a satisfactory conclusion on this point, it will be advisable to consider what the Common Law was, and what alteration was made in it by the Statute of Frauds. At Common Law no legal estate could be created in an incorporeal hereditament, save by grant under seal; but it is equally certain that at Common Law no freehold estate in land could be created, save by livery of seisin or by deed;—that is, no freehold estate in land could be created by

mere writing unaccompanied by livery of seisin, unless it were by bargain and sale, or by lease and release, which always implies a deed. But a valid agreement at Common Law could be made either by parol or by writing without seal, for the sale or for making a lease of any lands, or any estate or interest therein; and no doubt a binding contract for the sale or letting a right of fishing or shooting over a party's lands could be made by parol at Common Law. That being so, the Statute of Frauds was passed. The 1st section of that statute provides that no estate in lands and tenements should be created by parol, except leases which did not exceed three years; and it was further enacted by the 2nd section that no agreement respecting any contract or sale of lands should be binding unless it was in writing, and signed by the parties to be charged therewith. The effect of that was this, that a mere agreement by parol, either to lease or sell lands or incorporeal hereditaments, was not binding, but that an actual lease of lands would be valid, provided that it did not exceed three years; but this did not extend to incorporeal hereditaments, an interest in which could not be granted save by deed; and, in the same way, a freehold estate in lands could not be created, prior to the late statute, unless by deed or by livery of seisin. This Act of Parliament is then passed, entitled "An Act to Consolidate and Amend the Law of Landlord and Tenant in Ireland." Now, the first observation which arises is, that the object of this Act of Parliament was to reduce into one Act the various Acts regulating the relations subsisting between landlord and tenant. The Acts contained in schedule B to the Act are repealed, except so far as may be necessary to support any lease or contract entered into prior to the passing of the Act. The 1st section of the Statute of Frauds is included in it, and is therefore expressly repealed. The 1st section enacts.—[His Lordship read it.]—The question then arises, is there anything in this Act of Parliament which enables such an estate, or for a period not exceeding a year, to be created without a deed; because at Common Law, before the passing of this Act, no estate in an incorporeal hereditament, nor a freehold estate in lands, could be created without a deed. What then is the effect of this Act of

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Parliament? Formerly, nothing short of an actual demise created the relation of landlord and tenant. This Act of Parliament makes this revolution in the law, that the relation of landlord and tenant is now created, wherever it is agreed by one party to hold land from another in consideration of rent, or of anything in the nature of rent. If the matter stood there, is there anything to show that the relation of landlord and tenant can be created only by an agreement in writing? By the 3rd section of that Act of Parliament it is enacted that the relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties. There was in this case an express contract between the parties; and I see nothing in the 3rd section which requires that it should be in writing. Now I ask could it be contended, if there was a note in writing with respect to incorporeal hereditaments, creating the relation of landlord and tenant for a period exceeding a year, or creating a freehold estate in lands, that would not be sufficient under the 4th section of this Act?—[His Lordship read the section.]—It is clear that the meaning of the 3rd and 4th sections, taken together, is that, wherever the relation of landlord and tenant is intended to be created in corporeal or incorporeal hereditaments, it may be done by an agreement in writing. If therefore, according to the true construction of this agreement, the letting was for less than a year, it might have been done by parol, which could not have been the case under the Statute of Frauds, as the 2nd section of that statute relates to all agreements respecting land. It occurs to me, and to the majority of the Court, that if we are at liberty to give any effect to the glossary of the Act, the word "lands" embraces incorporeal hereditaments, and that it was the intention of the Legislature to place lands and incorporeal hereditaments on the same footing, so far as relates to landlord and tenant; and that therefore whatever is sufficient to create the relation of landlord and tenant in corporeal, is sufficient also with respect to incorporeal hereditaments. Very much weight has been attached to the argument that an incorporeal hereditament could only pass by deed. Now under the 4th section of the Landlord and Tenant Act, a freehold estate in lands can be created by an agreement

in writing ; and why should not an interest respecting incorporeal hereditaments be created in the same way ? I am aware that the 1st section of the Statute of Frauds is expressly repealed by the 3rd section of the Landlord and Tenant Act ; but it does not therefore follow that the 2nd section of the Statute of Frauds may not be partially impliedly repealed by the same Act. There has been no decision to the effect that the express repeal of one section of an Act of Parliament prevents the implied repeal of another section, if the Act should be inconsistent with it.

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Upon the whole of this case, which is one of considerable difficulty, we are of opinion that the verdict should stand, with the damages for the plaintiff at one shilling.

BALL and KEOGH, JJ., concurred.

CHRISTIAN, J.

I am of opinion that the verdict should be entered for the defendant, pursuant to the leave reserved. The action was for disturbance of the plaintiff in the enjoyment of a right of shooting and fishing, alleged to have been demised to him by the defendant for one year. To the maintaining of such an action, of course a valid demise was essential. The defence consisted substantially of a traverse of the demise, and the issues were all, in substance, did the defendant demise ? The plaintiff proved a verbal agreement by the defendant's agent, to let to him this shooting and fishing, which, upon the finding of the jury, must now be taken to have been an agreement for a year, and not for the shooting and fishing season only, as the defendant contended. The Counsel for the defendant called for a nonsuit, upon the ground that a verbal letting or agreement for a letting of an incorporeal hereditament was invalid to create an estate therein, and that consequently, there was no evidence in support of the issue. The LORD CHIEF JUSTICE refused to nonsuit, but reserved liberty to apply ; and upon motion founded on that liberty (the verdict having been for the plaintiff), the case is now before us.

We are all agreed that if the plaintiff can sustain his verdict at

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all, it must be upon a clause or clauses in the late Act for Amendment of the Law of Landlord and Tenant (23 & 24 Vic., c. 154). Mr. *Macdonogh*, who, as leading Counsel for the plaintiff, opened the motion to show cause against the rule *nisi*, evinced, I thought, considerable misgiving upon that part of his case, for he began by labouring the case much upon Common Law considerations, founded on the acts of the parties, and the difference between contracts executory and executed, referring to cases in which corporations had been held liable on executed considerations, though there was no contract under seal. The learned Judge, however, was not asked to leave any question to the jury, as to the effect of those acts and dealings, as founding a presumption that a grant under seal was in fact executed. We are all, I believe I may venture to say, of opinion, that if the matter rested on the Common Law, this verbal demise of an incorporeal hereditament, though only for a year, would be void. Finding the Court strongly against him upon that, Mr. *Macdonogh* then fell back upon the statute. He relied upon one section only, *the 4th*, as interpreted by the glossary in the 1st. The Counsel for the defendant were then heard, and applied themselves exclusively to the 4th section, and it was not until the plaintiff's second Counsel came to address the Court in reply that the 3rd section was even mentioned. I shall now proceed to consider the questions in the case, in the order in which they were argued, viz., first upon the 4th section alone, secondly upon the 3rd section, whether alone or conjointly with the 4th.

The argument upon the 4th section, as I understood it was this—that because that section requires that “Every lease or contract whereby the relation of landlord and tenant is intended to be created *for any freehold estate or interest, or for any definite period of time, not being from year to year, or any lesser period,* shall be by deed or note in writing,” that therefore it is to be inferred or implied that estates or interests from year to year, or any lesser period, may be without either deed or writing, and simply by words. Well, I really do not know how better to answer that argument, than by simply reading the section. These smaller estates and interests are simply out of that section. Whatever be

the efficacy of the 4th section, whatever be its legislation, these small estates and interests are simply excluded from it. It is precisely as if the section had concluded with a proviso, "that nothing herein contained, shall in any way apply to or affect estates from year to year, or for any lesser period." It is really, therefore, too clear for rational argument, that in order to find the law applicable to those smaller interests, we must look somewhere or other outside this 4th section of the 23 & 24 *Vic.*, c. 154. Well, if we have only the Common Law to look to, the answer is immediate. No estate or interest whatever, however small, can be created in such a hereditament as this, except by deed under seal. But then, Mr. *Ball*, the plaintiff's second Counsel, contends that the 3rd section of the statute has altered all; and that is what I have now to consider.

By the 3rd section it is enacted—[reads it]. The argument is founded on the concluding sentence of the section. It is said, that by it, all differences between one sort of hereditament and another, as regards the relation of landlord and tenant is abolished; and furthermore, that but for the 4th section, all differences between agreements verbal and in writing would be abolished, and that all that would be necessary in any case to constitute the relations of landlord and tenant would be an agreement, either verbal or written, by one party to hold under another in consideration of a rent. And then, it is said, as the 4th section, which requires a deed or writing, does not apply (as I have myself shown it does not) to estates from year to year, or any lesser period, those estates or interests remain under the 3rd section alone, and may consequently be created in any species of property whatever, by word of mouth only. Well now, the first answer to that is a very simple one. It is true that the 4th section of the late Act does not apply to such a case as this, but the 2nd section of the Statute of Frauds does, and is not repealed by this statute. The first section is repealed, but the second is not, and one of the provisions of that second section, as we all know, is, that no action shall be brought "upon any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed," &c. Well, that is still in full force,

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and under that the agreement proved in evidence here is void, for want of at least a writing, even if a deed under seal were not necessary. Therefore, there is here no valid agreement to hold in consideration of a rent, and therefore the 3rd section is *ex vi terminorum* simply inapplicable. Well, that is a very plain and simple ground by which that section is put wholly out of the argument. The able and skilful Counsel who raised the point perfectly well knew this, that, if even the Court could look outside the new Act, his point on the 3rd section must vanish. How then did he endeavour to anticipate it? Of course he did not venture to assert that the 2nd section of the Statute of Frauds was repealed: that was out of the question, because the late statute, so far from repealing that section, declares in express terms that it shall *not* be repealed. By the 104th section of the late statute, it is provided that the acts and parts of acts set forth in the schedule, so far as they relate to the relation of landlord and tenant, and "to the extent to which such Acts or parts of Acts are by such schedule expressed to be repealed, *and not further or otherwise*, shall be and are hereby "repealed." Well, the schedule mentions only section 1 of the Statute of Frauds; and of course, in the face of those express negative words, no one could contend for anything so merely irrational as it would be to say that expressly or impliedly the 2nd or any other section of the Statute of Frauds than the 1st was repealed by the 23 & 24 Vic., c. 154. Counsel did not argue anything so absurd as that; he kept the Statute of Frauds entirely out of view; and the way in which he endeavoured to attain his object was by presenting a view, which I must take the liberty of calling one of the boldest I ever heard advanced in a Court of Justice. His proposition was this:—you must confine yourselves within the Act of 23 & 24 of *The Queen*, you must not look outside it, either at the Common Law or at any other statute, because that Act constitutes in itself a complete *code* of the Law of Landlord and Tenant in Ireland; which, if it means anything, means this (and to give any value to the argument must be so understood), that it has superseded the whole body of the Law of Landlord and Tenant, whether written or unwritten; and that it is within the four corners of this statute that for the future

we must look for all law upon that great subject. I totally deny that such is the nature of the statute. It is not an Act of codification, but, which is a totally different thing, an Act of consolidation and amendment. Its functions are two-fold. First, it collects into one Act provisions from various former Acts, which Acts it wholly or partially, repeals; secondly, it amends certain experienced evils in the Law, both Statute and Common. But, subject to those partial operations, it leaves the Common and Statute Law in full force. It is in the first of those functions that it deals with the Statute of Frauds, and it does so by repealing, so far as regards the relation of landlord and tenant, the 1st section only (re-enacting it in its own 4th section), whilst it expressly declares that the 2nd section shall remain in full force in its bearing on the relation of landlord and tenant, as well as in all other respects; and, as I have already pointed out, that section entirely annuls the point upon the 3rd section of the new statute. But, independently of the 2nd section of the Statute of Frauds, suppose that section did not, as it plainly does, remove the 3rd section of the new statute out of the present field of discussion altogether, I should have no hesitation in stating my opinion to be that the function and object of that section have been entirely misapprehended. That section is plainly an example of the second of the two functions which I have ascribed to the statute. Two well-known evils existed in the law—the first, that however clearly parties might have shown their intention to create between them the relations of landlord and tenant, yet if the whole interest of the intending lessor passed, the relation could not exist, for want of a reversion, and the remedies incident to that relation were lost: the second, that if the instrument were worded as an executory agreement for a lease, and not as a present actual demise (a fertile source of litigation and conflicting decision), then the relation of landlord and tenant would not be presently constituted. The 3rd section was passed to remove both those evils, but there its operation ends. It is no part of its province to alter the law of conveyancing, by which, with respect to any particular species of property, a particular species of instrument is required to constitute a demise. Its effect, as I read it, is simply this, that whenever there is a transaction between

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parties, so carried out and evidenced as that the relation of landlord and tenant would be constituted, but for one or both of two reasons, namely, that there was no reversion, or that the language used was executory, then the relation *shall* be constituted, notwithstanding those objections. But as to the conveyancing formalities with which the transaction must be clothed, whether as to this or that species of property, it may be by parol, or must be in writing, or must be by deed, this section in my opinion leaves that to be dealt with by the rules of law which lie outside itself. And when we look outside it for the rules which apply to such a case as that before us, a letting for one year of an incorporeal hereditament, finding that the 4th section expressly excludes all letting for such a term from its operation, we have nothing left to look to but the Common Law, and the 2nd section of the Statute of Frauds. The former requires a deed, the latter requires at least a writing. The letting here was by parol—it is therefore void.

I shall now advert briefly to an argument *ab inconvenienti*, which was much pressed upon the Court. It was said that, unless the plaintiff's construction of the 4th section be adopted, the consequences will follow that, while a lease for 1000 years of an incorporeal hereditament will be good by writing without deed, a lease for one year or one day can only be by deed. Well, the first answer I give to that is, that if such an incongruity does arise upon the section, we cannot help it. The Legislature must be had recourse to. We have no right to resort to fanciful inferences or implications upon the statute, in order to avoid an inconvenience flowing (if it does flow) from its obvious construction. Plainly the Legislature has left these smaller interests to the governance of the law which lies outside this statute; and whatever be the consequences of that, we can only accept them. Beyond that reason it is not necessary to go; but I must confess I am not at all as yet convinced that this supposed inconvenience or incongruity does exist. It is better to avoid expressing opinions upon this new Act of Parliament, when the case does not necessarily call for them; and therefore I shall say no more at present than that, whenever the question arises whether the

4th section enables a lease of an incorporeal hereditament to be made for any term whatever, by writing without deed, it may be very strongly argued in the negative. It may well be contended that all that the statute requires is, that there must in all cases be either a deed or a writing to constitute the relation with which it deals—a writing at least, but that it by no means allows that in all cases whatever a writing shall be sufficient; so that if there be any cases in which the Common Law gives the preference to a deed over a mere writing, the statute leaves full scope to the Common Law in that respect. That is precisely the way in which the Statute of Frauds has been construed. By the first section of that statute, leases of any hereditament, corporeal or incorporeal, created by livery of seisin only, *or by parol and not put in writing, and signed, &c.*, shall have the force and effect of leases at will only. It never occurred to any one to argue that, because that statute thus required that all leases must be in writing, it followed that a writing should be in all cases sufficient, and that therefore, a deed was no longer necessary to the grant of an incorporeal hereditament. And so, although the Statute of Frauds excepts all leases not exceeding three years, made at a certain rent, no one ever thought of arguing that the effect of that was to exempt from the necessity of either deed or writing such leases in cases in which the Common Law required them to be by deed. Really, if the plaintiff's argument upon the new statute be well founded, it is incomprehensible how it happened that all the lawyers who flourished in the two kingdoms since the Statute of Frauds was passed in the reign of William the Third should have continued blind to a point which plainly arose on that statute, precisely as it does on this. Well, this 4th section was a re-enactment of the 1st section of the Statute of Frauds, which is repealed by this Act; and it may well be contended, whenever the question arises, that the same construction must be put upon it, which for nearly two centuries before it was put upon the Statute of Frauds. And if the section were thought incapable of this distributive construction then, there would, to my mind, be considerable ground for contending that for that reason this 4th section does not apply to incorporeal hereditaments at all: it

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certainly does not without the aid of the glossary. But the introductory terms of the 1st section prevent the glossary from extending the proper meaning of the terms, in any section where there is anything in the subject or context of the section repugnant thereto. Now, the subject of this section being to supply the place of the 1st section of the Statute of Frauds, *i. e.*, to superadd the solemnity of a writing to that which at Common Law might be done by parol, it might well be argued that it would be repugnant to the subject of that section to apply it to a species of property for which the Common Law itself required not merely a writing, but a deed, and thus give to the section in that respect the operation of diminishing instead of adding to the solemnities of conveyancing.

For these reasons, my opinion is that the case is untouched by either the 3rd or 4th sections of the new Act, and that the plaintiff ought to have been nonsuited, or a verdict directed for the defendant.



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April 27.

ARCHBOLD v. THE EARL OF HOWTH.

In an action for the breach of an agreement to execute a lease of lands to the plaintiff, of which he had formerly been in possession, as tenant from year to year;

MACDONOGH (with whom was *J. H. Monahan*) applied that the defendant might be at liberty, in addition to the pleas already pleaded, to plead a defence of the Statute of Limitations to the first count of the summons and plaint.

This was an action for a breach of an alleged agreement by the plaintiff, to execute to the defendant a lease of certain lands, of and also for false representation and fraudulent concealment, with regard to the existence of a memorandum of agreement for the lease, the defendant, after issue joined, applied to the Court for leave to plead the Statute of Limitations to the first count, in addition to the defences already on the file. *Held*—[CHRISTIAN, *J. dissents*], that inasmuch as the plaintiff had allowed himself to be evicted without seeking specific performance of the supposed agreement, and that there were counts on the record on which the plaintiff might recover in case the defendant were guilty of actual fraud in the transaction, that the plea ought to be allowed to be pleaded. *Held also*, that the plea of the Statute of Limitations is a defence on the merits.

Held, per CHRISTIAN, J., that the defendant, having lapsed his opportunity of pleading the above defence in the first instance, was not entitled to the favor of the Court.

which the plaintiff had formerly been tenant. The summons and plaint also contained a count for a false representation by the defendant to the plaintiff regarding the existence of a certain document whereby the defendant had agreed to grant a lease of the lands, on the faith whereof plaintiff had allowed judgment to go against himself by default, in an action of ejectment on a notice to quit, without seeking to enforce the agreement. There was also a count for fraudulent concealment of the same document. The defendant pleaded several defences, but had omitted to plead the Statute of Limitations to the first count, on the ground, as was stated on the affidavit filed in support of the motion, that at the time of pleading he was under the impression that the writ had been issued within six years from the date of the alleged agreement, which bore date the 20th of November 1857. Since the eviction of the plaintiff, the lands had been set to a third party, without notice of the alleged agreement.

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Counsel contended that the plea of the Statute of Limitations was now deemed a defence on the merits, though formerly it had been disallowed: 2 *Chitty's Archb.* p. 945; 1 *Tidd's Prac.* p. 568. The plaintiff lay by. The omission to plead this further defence in time was accidental. The Statute of Limitations is one of the defences which may be pleaded with others, without the special leave of the Court, under the Common Law Procedure Amendment Act 1853.

Serjeant *Armstrong*, and *Jellett*, contra.

This defence ought not, at this stage of the proceedings, to be allowed. Equitable relief is impossible. The new tenant is a purchaser without notice. The plaintiff could not reply fraud to this plea, and would therefore be placed in an unfair position. There is a defence of rescision of the contract on the record. They cited *Ritchie v. Van Gelder* (a).

Monahan, in reply. A.

If there be fraud on the part of the defendant, he may be mulcted for it on the other counts to which we do not ask to plead the

E. T. 1864. statute. The defendant might possibly fail on technical grounds to
Common Pleas prove the plea of the contract having been rescinded; and it would
 ARCHBOLD be unjust to deprive him of this further defence.

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Cur. adv. vult.

MONAHAN, C. J.

May 4.

This is an application, on behalf of the defendant, for liberty to file a further defence of the Statute of Limitations to the first count of the summons and plaint. The facts of the case, as appearing on the pleadings and affidavits, are these:—The summons and plaint contains three counts; the first is what, under the old form of pleading, would be an action of assumpsit, stating that an agreement was entered into between the plaintiff and defendant, that the defendant should execute to the plaintiff a lease, for a certain term of years, of a farm then in plaintiff's possession as tenant from year to year; and that, while this agreement was in full force, defendant Lord Howth executed a lease of the farm at an increased rent to other persons, and so disabled himself from performing his contract with the plaintiff. The second count is in the nature of an action on the case, alleging that the plaintiff was entitled to the benefit of the agreement mentioned in the first count. The defendant fraudulently represented to the plaintiff that the agreement was not valid or subsisting, and that in consequence of such fraudulent representation of the defendant, the plaintiff permitted his interest to be evicted by notice to quit, and an ejectment on the title on the expiration thereof; and that, after such eviction, the defendant Lord Howth set the farm to a third person, without notice of plaintiff's rights. The third count differs from the second in this, that, instead of relying on any actual fraudulent mis-statement, it alleges a fraudulent concealment by Lord Howth and his agents from the plaintiff of his rights under the agreement.

To the portion of the summons and plaint founded on contract the defendant Lord Howth filed several defences, the substance of them being, that the agreement for the lease had been abandoned, and that the plaintiff, though required, refused to take out a lease; and,

with respect to the counts founded on fraudulent misrepresentation and concealment, the principal, if not only, defence was a traverse of the misrepresentation and concealment. Shortly after these pleas were filed, during last Term, an application was made to the Court to set aside some of them as embarrassing. On that occasion an order was made, either setting aside or directing to be amended some one or more of the defences: at the same time, plaintiff obtained an order to make some amendment in the summons and plaint. On the discussion of that motion, Mr. *Macdonogh*, defendant's Counsel, applied for liberty to add a plea of the Statute of Limitations to the count on contract, stating that it was by some oversight or mistake, I think, of the pleader that it was not filed in the first instance. It was not questioned that the mistake occurred as stated; but plaintiff's Counsel objected that the application should be made by substantive motion on notice. The Court yielded to the objection; and the motion now came before us on notice. From the pleadings and affidavits, the undisputed facts are these:—The plaintiff, being tenant from year to year to Lord Howth, of a farm of some fifty or sixty acres of land, his lordship, in 1857 or 1858, gave notice to the plaintiff and the other tenants that he was willing to give them leases, on certain terms involving an increase of rent, and requiring all wishing to accept such leases to send in certain written proposals. The plaintiff, among others, did so: and his proposal was accepted by Lord Howth or his agent. Some time in the year 1862 or 1863 the plaintiff became in arrear, and Lord Howth served a notice to quit, and, on the expiration of the notice, demanded possession, and brought an ejectment on the title in the Civil-bill Court, under which he recovered possession of the premises, and after some time let the premises to a third person at an advanced rent. Lord Howth alleges that, long previous to the service of the notice to quit, a notice was served on the plaintiff and the other tenants, requiring them on a specified day to attend and execute leases in pursuance of their proposals; that several of the tenants, near neighbours of the plaintiff, did so, but that the plaintiff took no steps towards taking out his lease; and Lord Howth alleges that, from all these circumstances, he came to the conclusion that the plaintiff did not

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wish to take out a lease; and, accordingly, that having, as he supposed, completely evicted the plaintiff's interest, he let to another. The plaintiff on the other hand alleges that, though the other tenants were served with a notice to take out leases, that he was not, and that he in fact forgot the execution of the contract for the lease, and that Lord Howth or his agent was guilty of fraudulent misrepresentation and concealment in relation thereto; and that, in consequence thereof, when served with the notice to quit, and afterwards with the ejectment, he omitted to apply for a lease, or proceed in Equity for a specific performance of the contract. Without, at this stage of the proceedings, forming, much less expressing, any opinion whatever as to the probable result of the case, I may say that the only dispute in fact between the plaintiff and defendant is, whether the plaintiff's omission to require or enforce the execution of a lease proceeded from an inability or unwillingness on his part to do so, and for that purpose paying the arrear of rent he owed, and which is still due, or from any fraudulent representation or suppression on the part of Lord Howth, or his agent. The question is, on this state of facts should Lord Howth be allowed to file the further defence of the Statute of Limitations to the count on contract? It is not sought to plead this to the counts in tort. I am quite aware that formerly a defence arising from the Statute of Limitations was not considered in a very favorable light; and no doubt if an action is brought for a debt or sum of money admittedly due, one may consider the defence of the statute not a very honest one; but, though this may be so, still a plea of the Statute of Limitations is now looked on in a much more favorable light than formerly, so much so that it is one of the defences under the Common Law Procedure Act allowed to be pleaded, with others, without the leave of the Court; and in some cases to which we have been referred, the plea has been allowed to be filed after judgment, and the judgment set aside: and, though it may be difficult to refer to unreported cases, in which orders have been made, I have no doubt that latterly, when an application has been made to file a further defence, the only question the Court has considered

is, whether the defence might have been originally filed ; if so, an order is made allowing it, indemnifying the party as to costs. And I confess I do not see any reason why the defence of the Statute of Limitations should form an exception, nor that the defendant being a landlord, and the litigation being between his tenant and him, should make any difference in the case ; it being in effect conceded that the omission to plead this defence at the proper time proceeded from mere inadvertence.

The argument principally pressed and relied on by the plaintiff's Counsel was, that if the plaintiff, instead of proceeding at Law, had proceeded in Equity, the defendant could not rely on the Statute of Limitations ; and that the defendant, by his own act of making the lease to a third person, having prevented the plaintiff proceeding in Equity, he should not at Law be allowed to rely on the Statute of Limitations ; and further, that the defendant, by his own fraudulent representation and suppression, had produced the state of facts enabling him to rely on the statute ; and, as the plaintiff could not reply such fraud to the defence of the statute, the defendant should not be at liberty to plead it. The answer to this argument is, that it being the whole question in dispute between the parties, if the facts of the case be as alleged by the defendant Lord Howth, it is just the case in which the Statute of Limitations would, if applicable, be a most meritorious and proper defence for him to rely on, even though he might fail in proving that the agreement was actually rescinded, or that on technical grounds his special defence failed : and on the other hand, if in fact Lord Howth, or those acting for him, have been guilty of the fraudulent representation or suppression alleged by the plaintiff, the plaintiff will sustain no real prejudice by permitting the defendant to plead the required defence ; as, if the plaintiff establish his case of fraud, even though he fail on the count on contract, he will be entitled to a verdict on the counts in case, and no doubt recover ample damages for the alleged wrong. With respect to plaintiff's being deprived of the right to sustain a suit in Equity for specific performance, it is sufficient to say that if the case relied on by Lord Howth is at all

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a true one, wholly irrespective of any question arising on the Statute of Limitations, no suit for specific performance could be sustained. No doubt, if a tenant is in possession under an agreement for a lease, and a notice to quit is served on him, he may maintain a suit for specific performance, and an injunction to prevent the landlord executing an *habere*; but if, instead of doing so, he permits the landlord to recover in ejectment, and execute an *habere*, owing a considerable arrear of rent, it is new to me that in such a case a bill could be sustained for a specific performance of the agreement: but, be this as it may, the majority of the Court entertain no doubt whatever that the case is one in which the defendant should be permitted to plead the defence founded on the statute; but he must pay the costs of the motion, and any costs incurred by the plaintiff by reason of filing this additional defence.

BALL and KEOGH, JJ., concurred.

CHRISTIAN, J.

In this case I have the misfortune to differ from the LORD CHIEF JUSTICE. I think this motion ought not to be complied with. In the first place, I have no doubt at all that the Court is invested with the most absolute discretion to grant or refuse it, according to what it may deem just and right. The only doubt can be as to what should be the elements on which that discretion should be exercised. I quite agree with the defendant's Counsel that the plea is not to be rejected merely because it is the Statute of Limitations. It was once considered that the law looked with peculiar disfavor on that plea, so that when the defendant obtained an order for time to plead, if he pleaded the statute, it would as of course be set aside; but that was afterwards altered, and the Court refused to set aside the plea as of course, giving, as its reason, "that the plea of the statute was not *necessarily* unconscientious." But it appears, in one of those cases, that is, in the case of *Rucker v. Hannay* (a), that, after the Court had refused the motion to set aside the plea as of course, an application

was made on the special circumstances ; and, though the Court did not set the plea aside, yet it only allowed the defendant to retain it on the terms of his giving up the general issue which he had pleaded along with it. That is therefore a clear authority of the kind the Court asked for during the argument, that, where a defendant is before the Court in a position of default, asking leave to plead as a favor, the Court will grant or refuse the plea, with or without terms, and whether it be a plea of the statute, or whatever it is, according as it thinks justice will be best promoted. The case cited from 9 *Exch.* (*Ritchie v. Van Gelder*) is a clear authority to the same effect ; and, considering the strong language of the section of the Common Law Procedure Act on which that case turned, a much stronger authority, I confess I am not at all impressed by what was said as to the Statute of Limitations being one of the pleas which, with certain others, may be pleaded without order, or being a plea which, if defendant came in the ordinary time, on the ordinary affidavit, to ask leave *ex parte* to plead, the Court would pretty nearly as of course give with others. The same argument precisely would apply to *Ritchie v. Van Gelder* and to *Rucker v. Hanney*, and would indeed go to ignore the discretion of the Court altogether, because there is scarcely any plea which the defendant may not as of right plead, if he does it in the regular time ; but it is just because he has lapsed the regular time—because he has made a slip which places him in default, and obliges him to ask a favor—that the Court is entitled to look at the special circumstances, and grant or refuse the favor, as it thinks just. To say therefore that the defendant might at the regular time have pleaded the plea as a matter of course, is to say that which no one denies, but which is simply irrelevant to the present purpose. Such, then, is the position of the case. The defendant, being in default in asking a favor, it is the clear right and clear duty of the Court to look into the special circumstances, and refuse the motion, if it think justice more likely to be done without than with this particular plea. Well then, how is the Court to guide itself to a right conclusion upon that ? This at all events appears be tolerably evident, that if, from the nature

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of the action, and the pleas already on the file, the Court can see *a priori* that the plea asked for will be either unnecessary or unjust, either useless or mischievous, it will refuse to receive it. That is in my opinion precisely the condition of this case. The plaintiff, formerly a tenant of the Earl of Howth, sued his late landlord for an alleged breach of an alleged promise for a lease. He presents his case in two aspects—first, as upon contract; second, upon fraud and misrepresentation; to each of which there are of course distinct counts applicable. Well, that is a case of a kind in which most persons in the position of the noble defendant here would be desirous to have tried on the merits, and the merits only. The pleas already on the file place the case on the merits, and exhaust the merits. As to the second class of counts, those on misrepresentation and fraud, there is a simple denial; and the defendant's Counsel on the motion took some credit for their client that he disdained to seek for the plea of the Statute of Limitations as to those. Those counts are out of the case, so far as the present motion is concerned. The plaintiff may fail entirely on those, and yet have a perfectly good case on the count on contract. Well, the existing defences to that latter count are equally meritorious. There is first a denial that any contract was ever made; and there are then no less than six special pleas, which, in every phase and aspect which an exhaustive ingenuity could suggest, put forward the case that, if contract there were, it has been forfeited by the plaintiff's misconduct, by rescision, by *laches*, by non-performance of condition precedent. None of these pleas have been demurred to; it was not suggested that they were bad in law. I must presume that defendant's Counsel, when they pleaded them, thought them good in law. I see no reason myself to think them otherwise. If so, issues in fact must be taken on them; and on the trial of those issues the whole merits of the case will be exhausted. If Lord Howth can prove any one of those special defences, he will have judgment on the merits; but if, on the other hand, he should fail on them all, if the plaintiff shall prove the contract, and Lord Howth shall fail to prove any of his special pleas, the plaintiff will then be entitled to a

verdict on the merits. That is the position of the case on the pleas already on the file. What then is the purpose which alone can be served by the plea Lord Howth now asks the Court as a favor to allow him to plead? This, and this only, that, if beaten on the merits—if proved to have made his tenant a promise, and to have broken it without justification—he may have this reserve to fall back on, that he may say to his tenant, “your success on the merits is vain; I will pay you no damages, because, instead of issuing your plaint on the 29th of November 1863, you did not issue it until the 15th of December 1863.” Now, if there were no more, ought the Court to help a defendant to set up a defence which can serve no purpose but that? But the circumstance which is decisive to my mind is that which was pointed out by Mr. *Jellett*. If this case were in the Court which is the appointed one for rights of this description—the Court of Chancery, on a suit for specific performance, the Statute of Limitations could not be pleaded, because, as the defendant was in possession to a comparatively recent period, the date of the contract would be immaterial; the statute would be out of the case; and it must be determined solely on the merits. Why is it not in Chancery? Why is the plaintiff driven into a Court of Law? Because the defendant has by his own act interposed between himself and the plaintiff’s equity the insuperable barrier of a purchase for valuable consideration without notice. Now, that act of the defendant may have been a rightful act, or it may have been a wrongful act; which it was, depends precisely on whether the defendant can prove his existing defences; if he can, he does not want the Statute of Limitations; if he cannot, then his act in conferring title on a third person was wrongful as against the plaintiff. By that wrongful act he disabled him from suing in Chancery, where the statute would be of no avail; and plain justice requires that he should not avail himself of it here; still, if he had pleaded the statute in regular time, we could not deprive him of it; but when he has made a slip by which he has placed the case here in the position in which it would be in Chancery, and *ought to*

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E. T. 1864. be anywhere, the Court should not, in my opinion, relieve him
Common Pleas from that slip, and thereby restore to him an unfair advantage
ARCHBOLD which he omitted to avail himself of at the proper time.

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For these reasons, I am of opinion that the Court would best exercise the discretion which it undoubtedly possesses, by refusing to interfere. I deny that this is a motion of right, or anything like a right: on the contrary, I hold that it is the right, and the bounden duty of the Court, to look narrowly into the circumstances; and if the plea be one which can have no practical operation but to restore to the defendant an unfair advantage, which he forewent when he might have claimed it, the Court ought not to interfere.

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Queen's Bench

THE QUEEN, at the prosecution of JOHN THORNHILL,

v.

JOSEPH FISHBOURNE, Esq.,

The Arbitrator appointed in the matter of the Cork and Youghal
 Railway Amendment Act, 1856.*

(*Queen's Bench.*)

Nov. 16.

MANDAMUS.—In Trinity Term (8th June) 1863, the prosecutor obtained a conditional order for a writ of mandamus directed to Joseph Fishbourne, Esq., the arbitrator duly appointed in that behalf by the Commissioners of Public Works in Ireland, in the matter of the Cork and Youghal Railway Amendment Act 1856, commanding him, as such arbitrator, to inquire into, adjudicate upon, and assess the compensation to be paid to John Thornhill and James Hackett, as trustees and executors of the will of Joseph Helen deceased, by reason of a certain messuage, or dwelling-house, out-offices, lands, and hereditaments, situate at Tivoli, in the parish of St. Anne Shandon, and borough of Cork, of which the said John Thornhill and James Hackett, as trustees as aforesaid, are owners, being injuriously affected by the works of the said railway; and duly to make his award in that behalf.

The prosecutor and his co-trustee, and co-executor, James Hackett, on the 22nd of January 1862, obtained probate of the will of their testator, Joseph Helen, who had died on the 18th of November 1861, and had devised to them, upon certain trusts, his leasehold and freehold interests in the premises, injuriously affected by the works of the Cork and Youghal Railway Company.

Application for a mandamus to F., an arbitrator appointed pursuant to the Railways Act (Ireland), 1851, to award compensation for injuries to H.'s land, occasioned by certain works of the C. & Y. Railway Co. F. duly made his final award as to said works, in July 1859. The particular works affecting H.'s property were completed in August 1860. H. though duly noticed of the arbitrator's proceedings, made no claim for compensation till November 1862. *Held*, that H.'s laches precluded the Court

from exercising any discretion in his favor.

Held also (*hesitante*, FITZGERALD, J.), that an arbitrator cannot be compelled to amend or supplement his award, after it has been finally made up pursuant to the statute.

* Before LEFROY, C. J., HAYES, and FITZGERALD, JJ. (O'BRIEN, J., was sitting in the Consolidated Nisi Prius Court).

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By a deed of assignment, dated the 31st of October 1851, Joseph Helen acquired an estate for three lives renewable for ever, in one plot of ground, and the unexpired residue of a term of 900 years in a contiguous plot. On the freehold plot had been built, since the date (20th of November 1810) of its first demise, a capital dwelling-house, with a coach-house, stable, and other suitable offices; while the other plot (demise on the 6th of May 1814) had since then been formed into an ornamental garden. A road called the Lower Glanmire or Strand Road, running from west to east, formed the front or southern boundary of these two plots; and led from Cork to Glanmire. To the south of, and parallel with, this road flowed the river Lee, at the northern side of which was a quay in front of the freehold plot. The use of this quay had been granted to the lessee, his heirs and assigns, in the lease of 1810, and assigned along with the premises to Joseph Helen. To this quay free and ready access from the premises was gained by crossing the Lower Glanmire road.

By an Act of Parliament, obtained in the year 1854, the terminus of the Cork and Youghal Railway Company was fixed at Tivoli, in the city of Cork, at a spot near the premises in question. The Cork and Youghal Railway Company's Amendment Act 1856, however, authorised them to extend the railway from the terminus at Tivoli, to St. Patrick's Hill, in the city of Cork—a distance of one mile and forty-six chains; and to alter and divert the Lower Glanmire road, near to Mr. Helen's dwelling-house and premises, by carrying that road over the railway, on a bridge. Prior to the obtainment of this Amendment Act, the requisite plans and sections had been duly deposited with (amongst others) the Clerk of the Peace of the county of the city of Cork; and showed the extent and character of the diversion which it was sought to effect. The usual Parliamentary notices and advertisements were also duly served and published.

The avenue leading to Mr. Helen's house struck the Lower Glanmire road at a point where the carriage way was forty feet wide; there were besides two wide foot-paths.

The new road, which the Cork and Youghal Railway Company

has substituted for the Lower Glanmire road, is at the point of deviation opposite the premises and house, and passes in a direction from west to east over the railway, at a height of fifteen feet above the level of the former road; and, at the foot of the eastern slope of the bridge, the new approach to the entrance gate of Mr. Helen's avenue passes, for a distance of about twenty perches in a direction from east to west, through a narrow lane of about seventeen feet in width. This new approach is so narrow, that there is difficulty as well as danger in turning a car and horse thereon, and a two-horse vehicle cannot be turned there at all. The only other means of access from the Lower Glanmire road to Mr. Helen's house is by means of a flight of nineteen stone steps, placed within a few yards of the entrance gate of the avenue.

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The inconvenience resulting from the diversion of the Lower Glanmire road is so great, that, in consequence thereof, the tenant of the house and premises required the executors to reduce his rent from £50 to £35 a-year; that he surrendered the house and premises on the 29th January 1862; and that it was found impossible to re-let them until the 25th of March 1862, when the best rent which could be got for them was £30 per annum.

Early in February 1860, the greater portion of one abutment of the bridge had been built; and the bridge itself was built in August 1860, when every inconvenience, obstruction, and injury, caused by the diversion of the Lower Glanmire road, might have been ascertained, independently of any reference to the Parliamentary plans. The extension line was opened for public traffic in December 1861.

In pursuance of the Railway Act (Ireland) 1851, the Cork and Youghal Railway Company, on the 28th of June 1858, deposited, with the Commissioners of Public Works in Ireland, maps or plans, schedules, and estimates of the lands required for the extension authorised by the Amendment Act (1856). Duplicate copies were on the same day deposited with the Clerk of the Peace of the county of the city of Cork; and the said Commissioners having, in pursuance of the Company's application to that effect, appointed Joseph Fishbourne, Esq., to be the arbitrator to inquire into and

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FISHBOURNE adjudicate upon the value of the lands required for the purposes of the extension railway, notice of his appointment was duly published in the *Dublin Gazette*, and in the *Cork Southern Reporter*, on the 29th of June 1858, and on the 6th and 13th of July 1858. On several days in the following month of September, the arbitrator sat in the Imperial Hotel, in the city of Cork, to receive evidence relating to claims for compensation, and concluded his investigation on the 24th of September 1858. On the 8th of January 1859, the arbitrator's draft award was deposited with the Commissioners of Public Works in Ireland, and with the Clerk of the Peace of the county of the city of Cork, and with the Clerk of the Cork Poor-law Union; and on four different days in the same month, the proper notices of these several deposits were duly published in the *Dublin Gazette*, and in the *Cork Southern Reporter*.

In pursuance of these notices, the arbitrator again sat daily, from the 6th to the 14th of April 1859, in the Imperial Hotel, in the city of Cork, hearing and adjudicating upon objections to his draft award; and on the 25th of that month, he resumed and concluded his investigation into these objections.

On the 5th of July 1859, the arbitrator's final award was deposited with the Commissioners of Public Works in Ireland; and on the 18th of July, duplicate copies of it were deposited with the Clerk of the Peace, and the Clerk of the Poor-law Union in Cork. Notices of these deposits were duly published during July and August 1859, in the two newspapers above mentioned.

No claim for compensation, or objection to the draft award was made by Mr. Helen, though he carried on his business in the city of Cork; though, after the arbitrator's draft award had been deposited with the Commissioners of Public Works in Ireland, the Cork and Youghal Railway Company's solicitor caused his clerk, in February 1859, to serve on Mr. Helen, and on Mr. Helen's tenant, then in actual occupation of the house and premises, a copy of the published notices that the draft award had been so deposited; and though the illness (paralysis) of which Mr. Helen died did not attack him until February 1860.

The first intimation which the Cork and Youghal Railway Company received of a claim for compensation for injury to the dwelling-house and premises in question was served on the Company on the 25th of November 1862, and was signed by Patience Helen (widow of Joseph Helen, and testamentary guardian of their son, a minor), and the two executors. This notice set forth the nature of their interest in the premises, informed the Company that their works had injuriously affected the premises, and claimed compensation to the amount of £300; and further required the Company, in case they disputed the right to such compensation, to have it ascertained by arbitration, pursuant to the Company's Act of 1856, and the Acts incorporated therewith.

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On the 1st of January 1863, the same three parties by notice required the arbitrator to proceed under the said Acts to inquire into and adjudicate upon the compensation to be paid to them by the company, and to make award thereon pursuant to the said Acts. No answer was ever given to either of these notices.

The prosecutor stated his belief that the reason why Mr. Helen never applied for compensation, prior to the making of the final award, was, that he could not then have known that the house and premises would be injuriously affected by the company's works, inasmuch as the bridge and the new road had not then been erected or made. The prosecutor also stated that, as soon as the amount of injury was capable of being estimated, he caused an application for compensation to be made to the company through their engineer; but that they declined to entertain the question, on the ground that the arbitrator had made his final award in reference to all claims against the company.

Sergeant *Sullivan*, and *Jellett*, showed cause.

The powers and duties of the arbitrator have been defined and regulated by the 14 & 15 *Vic.*, c. 70, which has been continued by subsequent Acts. Once the railway company has lodged the maps and plans and estimates prescribed by section 4, and applied to the Commissioners of Public Works in Ireland to appoint an arbitrator under section 5, it has nothing further to do.

M. T. 1863. The arbitrator appointed in pursuance of the application of the company is the only person who can assess compensation; and the only method of getting compensation is by making an application to him. The course to be pursued is pointed out by the 8th and 9th sections of the Act, the latter of which enacts that the final award of the arbitrator "shall be binding and conclusive, subject to the provisions concerning traverse hereinafter contained, *upon all persons whomsoever.*" Therefore, provided that the preliminaries prescribed by the Act have been complied with, the award is binding on everybody; and the arbitrator is *functus officio*, and has no power to resume his functions, and to deal with the lands.—[FITZGERALD, J. Does the Act contain any provision enabling the arbitrator to make a supplemental award? There is a provision of that nature in the Drainage Acts.]—There is not any such provision; but ample time is allowed and public notice given before the arbitrator enters upon the investigation at all; and still further time is given for making objections to the draft award; so that no person can be taken by surprise.—[HAYES, J. The final award was made in the month of July 1859; whereas the bridge was not built, or the injury done, till August 1860. If Mr. Helen had applied to the arbitrator for compensation, he could not have made his case out absolutely and positively before the arbitrator. What then was he to do?—If the injury could not then be made out, the arbitrator might have postponed the hearing of the case. In *Rex v. Commissioners of Cockerhmouth (a)*, *laches*, not at all so great as exists in this case, was held beyond remedy. In that case the award had not been published even, and yet the application was too late.

Chatterton and Thomas Jones, contra.

The award does not bind the prosecutor, because Mr. Helen's name is not mentioned in it; and this is a case of admitted wrong, without any remedy but that by *mandamus*. The cases of *Little v. Dublin and Drogheda Railway Co. (b)*, and *Moore v. Great Southern and Western Railway Co. (c)*, show that no action at

(a) 1 B. & Ad. 378.

(b) 7 Ir. Com. Law Rep. 82.

(c) 10 Ir. Com. Law Rep. 46.

law can be maintained for consequential damages, but that damages may be given by the arbitrator from time to time. The Court therefore has power to direct the arbitrator to resume his proceedings, and to decide whether the prosecutor is entitled to any and, if so, to what remedy.—[LEFROY, C. J. Then you argue that the arbitrator may give compensation for consequential injuries *whenever* they arise.]—Yes; there was no actual injury done when the arbitrator made his award; and, even if it had existed, it is not a *res judicata* unless a claim had been made by Mr. Helen, and a decision given upon that claim. If such a decision had been made, the only remedy would have been by way of traverse.—[HAYES, J. In the case of *Regina v. Fishbourne* (a), I think a similar application was made; but it was refused, because not made promptly.]—The discretion of the Court will be exercised to prevent a grievous injury; and the statute does not prohibit the arbitrator from giving compensation at any time, but merely directs him how to regulate his conduct.—[LEFROY, C. J. The result of shutting out the prosecutor from a remedy by mandamus may, possibly, be that he will be left to seek his remedy at Common Law.]—*Moore v. Great Southern and Western Railway Co.* (b), and *Tuohey v. Great Southern and Western Railway Co.* (c), show that he cannot have a remedy at Common Law.—[FITZGERALD, J. Then must not your argument go to this length, that an arbitrator, once he is appointed, continues during the remainder of his life an arbitrator, to decide upon *all* claims that may be made in relation to the matter in which he is appointed?—No; because this Court would, in exercising its discretion, be guided by the Statute of Limitations.—[FITZGERALD, J. I do not speak of our discretion, but of a matter of law. If an injury arose twenty years after the final award had been made, would not your argument go to the length that, if the plans reasonably indicated the injuries, the arbitrator would have to re-open the case?—Yes.—[HAYES, J. But if the arbitrator be *functus officio*, what right have we to

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(a) 7 Ir. Com. Law Rep. 6.

(b) 10 Ir. Com. Law Rep. 46.

(c) 10 Ir. Com. Law Rep. 98.

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galvanize a defunct tribunal? We may compel existing tribunals to exercise their functions, but I do not think that we have the power which we are required to exercise.—LEFROY, C. J.

And does not the case of *Little v. Dublin and Drogheda Railway Co.* afford an inference against the prosecutor? That case was decided upon the ground that the provisions of the English Act, under which each claimant may have an arbitrator appointed *pro hac vice*, were embodied in the Special Act of the company upon which that case was decided.—FITZGERALD, J. The Court there said that, *quâcunque viâ* the party had a remedy, as the general provision of the English Act had been adopted in the company's Special Act.]—The 14 & 15 Vic., c. 70, was intended to substitute in Ireland a cheap method, in place of assessing damages by juries; and the remedy given by it should be construed to be co-extensive with the provision of the English Act for which it was substituted, the wrongs being precisely the same. When section 9 enacts that the award shall bind "all persons whomsoever," it means all persons named therein. That interpretation is confirmed by section 26, which gives the right of traversing the award only to persons named in it. *Ravee v. Farmer* (a) shows that this applicant is not precluded because the final award has been made.

Jellett, in reply.

A party who deliberately withholds his claim, though the plans and maps show distinctly the injury that will affect his lands, cannot reserve to himself the right to bring forward his claim at a later period. The meaning of the words "binding on all persons whomsoever" is binding, so far as relates to the amount of compensation, on all persons named in the award, and binding upon all other persons that they have not any claim. The arbitrator makes out his draft award from the claims submitted to him; and, if parties wilfully abstain from submitting to him their claims, the fault is theirs only. It is an abuse of language to say that the arbitrator is to make a *final* award, and then go

(a) 4 T. R. 146.

on to say that he may supplement it *de die in diem*, aye, and *de anno in annum*. His powers cannot be revived from time to time.

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Cur. adv. vult.

LEFROY, C. J.

We have been referred by my Brother HAYES to a report of a case, *The Queen v. Fishbourne* (a), with the same name in which an application for a mandamus was made upon the same defect as is alleged here; but it was refused, upon the ground that the claim was not made until five years after the party had had an opportunity of bringing his case before the arbitrator. The prosecutor here puts forward his claim after a lapse of four and one-half years. We are therefore of opinion that, for that cause alone, the prosecutor should not have the writ for which he asks. We think so too, in addition to the ground of delay, upon the ground that the prosecutor is not at law entitled to get this writ. In England the law upon this subject is different from the law in Ireland. In England the party is entitled to have an arbitration *pro hac vice*; but in the cases in Ireland a public officer is appointed arbitrator. He has an authority specified by the Act of Parliament, which gives him that authority with certain limitations and qualifications. He has exercised his jurisdiction according to the provisions of the Act; and his award is final and conclusive. It does not appear that he has in any manner violated the authority given to him by the Act; and therefore his award is finally and conclusively binding. But at all events the prosecutor has not come with his application within a reasonable time, so that we must refuse his application.

The case, *Little v. The Dublin and Drogheda Railway Co.* (b), referred to during the argument as having been decided by the Court of Common Pleas, strikes exactly upon the difference between the jurisdiction in England and in Ireland; for the privilege which in England is given to the parties by the general provisions of the law, was in that particular case introduced into Ireland in a clause in the Special Act of the company; showing thereby

(a) *Ubi supra.*

(b) *Ubi supra.*

M. T. 1863. that in the case referred to the result should be in Ireland the
Queen's Bench same as it would be in England. That case therefore is no au-
 THE QUEEN thority whatsoever upon the general law in Ireland; and the
 v. FISHBOURNE present case must be decided upon that law.

HAYES, J.

Upon both the grounds stated by the LORD CHIEF JUSTICE, I concur in the judgment. The ground of the prosecutor's delay is disposed of by *Regina v. Fishbourne* (a). As to the other ground, that the award of the arbitrator is final and conclusive, I was anxious yesterday to have an opportunity of looking into the several sections of the Lands Clauses Consolidation Act (Ireland) (b), to see whether the system there laid down was similar to that referred to in the case of *Little v. The Dublin and Drogheda Railway Co.* (c). I find them to differ so materially that that case cannot rule the present. By our Lands Clauses Act (section 4), the company is to prepare maps and plans as well as estimates of the value of the lands required for the railway, and of all interests therein not contracted for, and (section 8) to give notice requiring all persons claiming any right to or interest in the lands, or whose lands will be injuriously affected, to appear on a certain day fixed by the arbitrator. It is manifestly the duty of all such persons to come in upon that day, and make their claims before the officer who, by the 6th section, is furnished with all the necessary powers and materials for coming to a decision on all claims. The Act then goes on, in the 9th section, to say that the arbitrator shall adjudicate on the several matters so referred to him, and, having done so, shall proceed to frame a draft award, which, after being submitted to further consideration, shall eventuate in a final award. In one section (section 10) no doubt the Act speaks of *several* awards; but that section never was intended to include the case of a person who chose to forego the opportunity which the law afforded him of having his case considered by the appointed tribunal at the appointed time. There may be

(a) *Ubi supra.*

(b) 14 & 15 Vic., c. 70, continued by 19 & 20 Vic., c. 72.

(c) *Ubi supra.*

several awards as to several lands; but, as to all the lands comprised in any one award, and every interest concerning them, that award must be final and conclusive. The arbitrator having disposed of every matter duly presented to him for adjudication, we are now called on to stir him again into action—in fact to galvanize a defunct tribunal. We have no authority to do that; and therefore I think that, upon both grounds, this motion must be refused.

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I also concur in the judgment of the Court, upon the first ground stated by the LORD CHIEF JUSTICE, *i. e.*, delay. I think that in granting a writ of mandamus, we ought not to exercise our judicial discretion in favor of a claimant who has lain by so long, and with repeated opportunities to bring forward his claim, if it existed, and have it adjudicated upon by the arbitrator.

Upon the second and principle question, whether we have, as an Appellate Court, any authority to direct the arbitrator to make a supplemental award,—it is not now necessary for me to express any opinion; and I should upon that question rather reserve my opinion. At the same time, I may now state that my strong impression is, that when the arbitrator has once disposed of *all* the claims brought before him, and has made his final award, we have not any authority to set him once more in motion.

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HUGH HANBURY v. JAMES JONES.*

Nov. 3.

Motion to set aside judgment, on the grounds of compromise pending, breach of faith, and irregularity of writ. A plaint in ejectment described the lands as situate in the "county of Dublin." The venue, when the writ was issued, was "county of the city of Dublin." Subsequently, but before the writ left the hands of the attorney's clerk, this was corrected, and the writ was then re-sealed. The time to plead expired on 31st of July. Before this a negotiation was going on, and stood over till August 5th, when the defendant's attorney served notice relying on irregularity of writ, and cautioning plaintiff not to mark judgment. — *Held*, that the negotiation was put an end to by the defendant's notice.

APPEAL.—On the 2nd of October 1863, HAYES, J., refused to grant a motion, made on behalf of the defendant, to set aside the judgment in this cause, and any *habere* issued thereon. The present motion was a renewal of the former motion, in the nature of an appeal from the decision then pronounced. Both motions were made on the following grounds:—That the judgment was marked irregularly, in breach of good faith, and by surprise: that the proceedings were irregular, because the plaint, after it had issued and passed the seal of the Court, was altered, and the venue erased, and another venue substituted and written on the erasure, without an order of the Court to change the venue, or amend the writ: that no rule to proceed, compromise off, was entered before the marking of the judgment.

The action was one of ejectment on the title; and, in the body of the plaint, the lands were described as "situate near Roundtown, "in the parish of Rathfarnham, in the barony of Rathdown, in the "county of Dublin."

The plaint was issued on the 10th of July 1863, and the marginal venue was then "county of the city of Dublin," the seal of the Court being affixed over the marginal venue.

Subsequently an alteration was made, whereby the marginal venue was changed to "county of Dublin." The writ was re-sealed, the second seal partly covering the first one. The writ was not served until the 17th of July 1863; and the following account of these transactions is extracted *verbatim* from the affidavit of Michael Cullen, clerk to the plaintiff's attorney:—"That, "by directions of the plaintiff's attorney, *I*, on the 10th day of "July last, filled up the original writ of summons and plaint in

Held also (*hesitante* O'BRIEN, J.), that the writ was not irregular.

* Before the Full Court.

"this cause, and got same sealed by the proper officer of this Court. M. T. 1863.
"That, at the time *he* so filled up and issued said writ, *he* by *Queen's Bench*
"mistake, in the hurry of business, inserted the venue of the *HANBURY*
"action as being in the county of the city of Dublin, the lands *v.*
"being in the county of Dublin, *he* says that, on the same day, *JONES.*
"and within a short time after *he* had so issued said writ, and
"before same left *my* possession, or was in anywise acted upon,
"he discovered said mistake *I* had so made, and *I* changed the
"venue to the county of Dublin, and *I subsequently* got the
"officer of the Court to reseal said writ after *he* had so made
"said alteration, and before said writ was in anywise acted upon,
"or left *his* possession." This deponent also denied that the writ
had been in any respect altered or tampered with after the re-
sealing.

During the argument of the motion, the original writ was produced in Court, as was also the book in which, under the Common Law Procedure Amendment Act (*Ir.*) 1853 particulars of all writs issued and sealed are entered. The only entry in that book, touching this writ was of the date of the 10th of July.

The 31st day of July was the last day for pleading, and it appears from the affidavits, that, in actions of ejectment, no defence will be received in the office after the expiration of twelve clear days from the service of the writ, even though no judgment has been marked, unless by the leave of the Court.

The defendant stated in his affidavit that, towards the close of the month of July, he called on the plaintiff's attorney, who promised not to do anything further, till Tuesday, August 4th; and deponent, believing that the proceedings would be abandoned, did not instruct any attorney to take defence.

On the 3rd of August, defendant had another interview with plaintiff's attorney, and refused the terms which were then offered to him.

On the 5th of August, plaintiff's attorney, replying to a request for consideration, thus concluded a letter to the defendant's attorney:—"So will you communicate with your client, and let me know *in the course of to-morrow*, if he will settle on those terms."

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Defendant instructed another attorney, on the 5th of August, who prepared and tendered a defence on the same 5th of August, but the officer would not file it, as the 31st day of July was the last day for pleading.

On the 5th of August, the defendant's attorney served on the plaintiff's attorney a notice cautioning him not to mark judgment, and requiring him to enter a rule to discontinue, as the plaint was irregular.

On the 6th of August, defendant's attorney wrote to plaintiff's attorney a letter stating that the plaint had been erased and altered after sealing, and requiring to be informed, before five P. M. on the same day, whether a rule to discontinue would be entered.

This answer was written to that letter:—"The judgment was "marked in this case at twelve o'clock this day, and your note did "not come to hand until half-past three o'clock. I am not aware "of any irregularity in the case, and therefore decline to comply "with your request, and will act on the judgment."

Dowse and *O'Neill* moved to set aside the judgment and *habere*.

They relied upon the letters and conversations, to show that a compromise had been pending, and contended that it was a breach of good faith to mark judgment on the 6th of August, since the letter of the plaintiff's attorney had granted to the defendant the whole of that day to determine whether he would accept the proposed terms. A writ may not be resealed without the order of the Court: *Freeman v. Kellett* (a).

The change of the venue was an alteration of the writ, for a motion to change the venue is always to the effect that the writ may be amended by changing the venue. If the alteration be not a material one, it need not be made at all. If it be material, it cannot be made without an order of the Court: *Common Law Procedure Amendment Act (Ir.)*, 1853, ss. 16, 44; and 40th *General Order*.

Sydney, contra, contended that there was not any compromise

(a) 8 Ir. Com. Law Rep. 52.

pending; and that, at all events, the compromise, if any, had been terminated by the defendant's attorney's notice of the 5th of August. As to the alteration of the writ, he maintained that it was not improper to alter an apparent error, before the writ had been acted upon.

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O'Neill was heard in reply.

LEFROY, C. J.

This motion is an appeal from a decision of my Brother HAYES, and is brought upon three grounds—that the judgment was marked while a compromise was pending, though no rule to proceed, compromise being off, had been served; that the judgment was marked in breach of good faith during the pendency of a negotiation; and there is another and a distinct ground, namely, that there was in fact no jurisdiction, for that the writ under which the party proceeded was sealed by the officer a second time, contrary to the law, and without authority.

The first objection is founded upon the meaning of the term “compromise.” There was not a “compromise;” there was a negotiation. Then, with respect to the effect of the negotiation, it appears that the party had during the whole of the next day to say whether he would accede to the terms proposed. That shows that it was nothing but a negotiation—no compromise. But before the next day, the defendant served a notice which put an end to the negotiation altogether, and put the parties at arm's-length. Therefore, there was neither a compromise, nor a breach of good faith; so that this reduces the question to the remaining objection, which I think has been rested upon in a forgetfulness of the doctrine of the Common Law as to a misprision. By the Common Law, the clerk who issued a writ had a right, while it was within his power, to correct misprisions—mistakes on the face of the writ, although he had sealed it, if he, after the alteration, resealed it; because then he made it, what it ought to have been at all times, a legal document. In this case the writ, as it was issued and sealed, was I take it a perfect nullity; for it was a writ of summons and plaint in ejectment, in the body of which the lands were stated to be in

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the county of Dublin, while the statement of the venue in the margin was the county of the city of Dublin. That was an illegal document—a nullity; it was no writ; and it was the officer's duty, in compliance with the paramount duty of all officers, that is, to do their duty according to law, and not to give an authority that the law did not sanction. He had a right, when he found that mistake, to correct that document, and to set it right by that authority which the Common Law gave to every clerk entrusted with the issuing of a writ to correct any mistake on its face, sealing it anew after the correction, if any, had been made; so that every writ going forth from the office should be a writ according to law. The alteration made in this case was nothing but the correction of a misprision. The venue in the body of the writ being right, was by the officer set right in the margin also; and, being so corrected, the officer sealed it again; and it is not pretended that the plaintiff used, or attempted to use, the writ before it had been resealed. We have the seal-book, a record to ascertain to us that when the writ was issued it had been resealed, as it ought to be. It is entered in the book as with a correct venue; and the document has been I confess resealed; for the original seal that was put to it has been partly effaced by the additional seal that was put to it after it had been corrected and made right; and so it appears now in the book, which is a record coinciding with the document itself, which was produced to us, and corroborates by matter of vision, if I may so speak, everything that has been stated on that matter.

Therefore, every ground alleged to impugn the decision of the learned Judge fails, and we affirm his order in its entirety.

O'BRIEN, J.

I concur in the judgment pronounced by the LORD CHIEF JUSTICE, though I feel some difficulty as to the objection about the resealing of the writ; for I think it is very probable that it was not resealed until the next morning; and though the merest technical alteration has in this case been made, yet I think that a writ, which has once been sealed, cannot be altered and re-

sealed without the authority of the Court, after the lapse of any interval.

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FITZGERALD, J.

I concur in the judgment of the Court, but wish, specially and guardedly, to define the ground upon which I think that the order of my Brother HAYES should be established. The writ, as originally presented to the officer, had a local description of the lands stated thus in its body—"situate near Roundtown, in the parish of Rathfarnham, in the barony of Rathdown in the county of Dublin." Now, the Common Law Procedure Amendment Act (Ireland) 1853, s. 196—for the 10th section does not apply to actions of ejectment—enacts that the venue *shall* be laid in the county in which the lands are situated. But a misprision took place in the marginal statement of the venue, which should have been corrected at the moment when the writ was presented to the officer to be sealed. But on the same day, as we must now take it, and before the writ leaves the hands of the clerk who issued it, he discovers the misprision; goes back to the officer, and corrects it, and gets it resealed; and we must take it that this correction was made on the same day; for though it is probable that the correction and resealing did not take place until the following morning, and before the book was opened for the next day, yet from the book itself it must be taken that it was corrected on the same day, the 10th of July 1863. Viewing it in that light, and there being no alteration in the book itself, and acting on the assertion that it was brought back on the same day to the officer, and the error apparent on the face of the writ shown to him, the officer corrects it, and reseals the writ. But still, though expressing myself very strongly against alterations, without an order from the Court, I think that this was not an alteration of an issued writ, but a correction of an oversight apparent on the face of the writ; which correction was part of the same proceeding, and would have been made on the moment if it had been pointed out.

As to the other grounds, I think that the order appealed from was also correct. There was no compromise pending at all. This

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writ having been issued, a representation was made by the defendant's attorney, that the defendant was a poor man; and they suggested that the plaintiff should take less than the full amount of his demand. That suggestion was followed by letters from the plaintiff's attorney, dated 30th of July and 5th of August, stating that the plaintiff was willing to take less; but, in place of acceding to these terms, the defendant's attorney put an end the negotiation, by serving the notice of the 6th of August, saying that the plaintiff's proceedings were irregular, and putting him at arm's-length.

**THE QUEEN, at the prosecution of the GREAT SOUTHERN
 AND WESTERN RAILWAY COMPANY,**

v.

**THE JUSTICES OF THE PEACE IN AND FOR THE
 BOROUGH OF CORK.***

E. T. 1864.
April 19, 22.

By Act of Parliament, a railway company were bound to keep in repair "the immediate approaches" to a certain bridge. The Justices of the county made an order on summons, requiring the company to repair "ninety-two perches of the road leading and being the approach to the bridge," &c.—*Held*, a bad conviction, for not showing that this space was "the immediate approaches" which alone the Justices had jurisdiction to order to be kept in repair.

CERTIORARI.—On the 31st of December 1863, the prosecutor's station-master in Cork was served with the annexed summons:—

"SUMMONS.—POLICE OFFICE, BOROUGH OF CORK.

"The Mayor, Aldermen, and Burgesses of the borough of Cork, to Sir John Benson, knight, Surveyor of Roads in and for the said borough of Cork—Complainants.

The Great Southern and Western Railway Company, and Wm. Taylor, Esq., their Secretary, Alfred-street, in the said borough of Cork—Defendants.

"Whereas a complaint has
 "been made to me that, on
 "the 20th day of Decem-
 "ber 1863, and up to the
 "present time, ninety-two
 "perches of the road lead-

"ing and being the approach to the bridge at the mouth of the

"tunnel over the company's railway at, and made by them in the

* Before LEFROY, C. J., HAYES and FITZGERALD, JJ.

"place of that portion of the Lower Glanmire-road, in the parish of St. Anne's Shandon and borough of Cork, were and still are out of repair; and although you the defendants were duly noticed and required to repair the said ninety-two perches of road, have failed and neglected, and still fail and neglect, to repair the same, contrary to law:—this is to command you to appear as a defendant on the hearing of said complaint at the police-office, Cornmarket-street, in the said borough, on Monday the 4th day of January 1864, at twelve o'clock, before such Justices as shall be there.

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"HENRY L. YOUNG, Justice of said borough."

"To the defendants named.

This 31st day of December 1863."

On the hearing of this summons the defendants appeared, and defended the summons; but the Justices made the following order:—

"We order the Great Southern and Western Railway Company, within ten days from this date, to put into complete repair *ninety-two perches of the road referred to* in the notice and summons before us this day, on the Lower Glanmire-road, in the barony of Cork."

"Magistrates present—JOHN LEWIS CRONIN, R. M.

GEORGE CHATTERTON."

On the 12th of January 1864 the Court granted a conditional order for a writ of *certiorari* to remove the above order, that it might be quashed, as bad and insufficient on its face; as having been made without and in excess of jurisdiction; and as irregular, illegal, and void.

Against that conditional order cause was now shown by—

The *Solicitor-General* (*J. A. Lawson*), with whom were *Macdonogh* and *Goold*, who contended that where a road is, by means of a bridge, carried over a railway, the company is bound, under the 8 *Vic.*, c. 20, s. 46, to keep the bridge and the approaches thereto in repair. A road running under a railway-bridge cannot be deemed an approach to the bridge; and therefore the company is not bound to repair it: *The Waterford and Limerick Railway Co. v. Kearney* (a); *Fosberry v. The Waterford and Limerick*

(a) 12 Ir. Com. Law Rep. 224.

E. T. 1864. *Railway Co. (a)*. But the liability of the company to repair the approaches to a bridge which spans the railway is unquestionable: *Queen's Bench*
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CORK. *The North Staffordshire Railway Co. v. Dale (b)*; *The Trustees of the Newcastle-under-Lyne and Leek Turnpike-roads, appellants, The North Staffordshire Railway Co., respondents (c)*; *The London and North Western Railway Co. v. Wetherall and another (d)*.

Jellett (with whom was Sergeant *Sullivan*) did not dispute the general proposition that a railway company is bound to keep in repair the approaches to a bridge spanning their railway, as well as the bridge itself. Counsel contended, however, on the authority of *Little v. The Newport, Ab. and Herd. Railway Co. (e)*, that the provisions of the company's Special Act (16 & 17 Vic., L. and P., c. 142), which authorised them to make this deviation, must prevail over the provisions of the general statute, 8 Vic., c. 20, s. 46; and that, in this particular instance, the company, having complied with the Special Act by making a road in substitution for the road which they destroyed, were discharged from further liability.*

Sergeant Sullivan.

The 8 Vic., c. 20, s. 46, specifically designates the part of the road which the company is bound to keep in repair, namely, the "immediate" approaches to the bridge. The absence of the word "immediate" renders the order of the Justices utterly bad. It is absurd to say that ninety-two perches (considerably more than one quarter of a mile) could be taken to constitute the "immediate" approach to a bridge, even if the word "immediate" had been inserted in the order. That word in the 8 Vic., c. 20, s. 46, shows that the Legislature intended the Justices to define what is the immediate approach which they order a company to repair.—[LEFROY, C. J. Does not the Act state the *terminus a*

(a) 13 Ir. Com. Law Rep. 494.

(b) 8 Ell. & Bl. 836.

(c) 5 H. & N. 160.

(d) 20 Law Jour., N. S., Q. B., 338.

(e) 12 C. B. 752.

* Counsel's argument on this point is not reported at length, inasmuch as the case was decided on the technical point subsequently raised by Sergeant *Sullivan*.

quo as well as the *terminus ad quem* ?]—No; and that renders it the more imperative on the Justices to define what part of the road the company is bound to keep for ever in repair. The 14 & 15 *Vic.*, c. 93, requires the Justices to state the complaint in their order-book; and the order should have found in express terms that *that* part of the road which the company have been ordered to repair is the very thing, namely, the “immediate” approach to the bridge, which the company are by law bound to repair. These undefined ninety-two perches may include some level space, as well as the ascent and descent, which are the immediate approaches to the bridge.—[FITZGERALD, J. How could the company ascertain from the order of the Justices what part of the road these ninety-two perches constitute ?]—No one could tell where the part which is to be repaired begins, and where it ends.—[FITZGERALD, J. Besides, the plain reason for putting this provision into the Act is that, as the county surveyor, if he had power to repair the bridge and its immediate approaches, might greatly injure the railway, therefore the duty to repair the immediate approaches to the bridge, as well as the bridge itself, is cast upon the company.]—At all events, it is quite impossible for the company to ascertain what precise portion of the road is required by the order to be repaired by them. The order is therefore bad for uncertainty, especially as the company are subject to heavy pecuniary penalties if they do not comply with the order.

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Macdonogh, in reply.

[HAYES, J. Supposing that the company are willing to obey the order, where are they to find the ninety-two perches?—FITZGERALD, J. The summons too might have been corrected by the Justices. The 8 *Vic.*, c. 20, s. 46, makes it obligatory on the company to keep in repair the bridge and its *immediate* approaches; whereas the summons, and the order too, do not deal at all with the *immediate* approaches, but with the approaches *generally*.]—The only question is, whether the Justices had jurisdiction? The Act itself defines the locality.—[FITZGERALD, J. The Special Act seems to bring the road within two classes of

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clauses; one class deals with the new diverted road; and the second, with the bridge, and the approaches thereto. The new diverted road really consists only of the bridge and its approaches.—[FITZGERALD, J. The summons does not require the company to repair the bridge and the approaches thereto. But I would read the summons as being a requirement to repair the approach to the bridge.—HAYES, J. Supposing that the facts are correctly stated in the affidavit, still it by no means follows that the company are bound to repair the whole of the ninety-two perches, which would from the affidavit appear to be the interval between the point of diversion of the road on one side of the bridge, and the point of diversion on the other side.]—This technical point should have been, but was not, argued in the Court below.—[HAYES, J. Would it not be better to let this order of the Justices be quashed; let the matter come before the Justices again, and let them state specifically on their order whether these ninety-two perches constitute only the bridge and its approaches?—It is sworn in the affidavit that the bridge and its approaches constitute the entire of the deviated road; the incline begins at each side from the point of deviation.

The 8 *Vic.*, c. 20, s. 46, is in enforcement of the Common Law: *Rex v. Kerrison* (a). Under the 22 *Hen.* 8, c. 5, s. 9, it was necessary to repair 300 feet on each side of the bridge—[LEFROY, C. J. You have removed my great difficulty in the case, namely, that the parties ordered to do this act could not find out where it was to be done.—HAYES, J. It does not appear from the *record*, though no doubt it appears on the affidavits, that these ninety-two perches constitute *the* thing, and nothing more than *the* thing, over which the Justices had jurisdiction.]—Every part of the deviated road is the *immediate* approach to the bridge.—[HAYES, J. But the Justices have not *in their order said* that; and it cannot be made out by the aid of the affidavits.—FITZGERALD, J. Mr. *Macdonogh*, you call 709 feet on *each* side of the bridge the *immediate* approach to it. An engineer, or somebody in that capacity, should have been examined in the Court

below to tell the Justices what constituted the *immediate* approaches to the bridge.]

Goold.—Sir John Benson *was* examined before the Justices; but this question was not argued.

Macdonogh.—The statute has taken away the *certiorari*; and it is necessary for the prosecutor to show that the Justices had no jurisdiction to deal with the subject-matter with respect to which they decided.—[HAYES, J. The Justices have taken upon them to order the company to repair the whole of the diverted road. They have no such authority; their authority is to order the company to repair all the bridge, and the *immediate* approaches *thereto*.—[LEFROY, C. J. The question is, can we do the duty of the Justices?—But can the Court, since the *certiorari* has been taken away by statute, say that the Justices had no jurisdiction.

Per Curiam.—Let the conditional order for a writ of *certiorari* be made absolute. We express no opinion on the substantial question.

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THE GREAT SOUTHERN AND WESTERN RAILWAY
COMPANY, *Appellants*;

SIR J. BENSON, Surveyor of Roads for the District of the
Borough of Cork, *Respondent*.

E. T. 1865.
May 2.

THIS was an appeal on a case stated from an order of the Justices of the borough of Cork. The order was against the appellants, to repair certain approaches to one of their bridges over the Glanmire-

Case stated.
By a Special
Act, a Rail-
way Company
were permitted
to construct
certain works,

under conditions more onerous for the company, than the similar provisions of the Land Clauses Act required. This Special Act contained no provisions for the future repair of the works so constructed, but provided that nothing therein should exempt the company from the provisions of any General Act. The company having fulfilled the conditions as to the construction of the work, contended that their liability ceased. *Held*, that the Land Clauses Act applied, and the company were bound to keep the works in repair.

E. T. 1865.
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road. The respondent had obtained an order against the company before, but it had been quashed by this Court, from a defect in the summons: *The Queen v. The Justices of Cork (a)*. On the 7th December 1864, the respondent served a notice on the company requiring them to repair the portion of the road in dispute, within ten days, and this notice not being complied with, obtained a summons against them, in the following form:—"Whereas a complaint has been made to me, that on the 7th and 8th days of December 1864, and up to the present time, 507 yards in length, and with a width throughout of 53 feet 4 inches or thereabouts, of that part of the Glanmire-road, Lower, in the borough of Cork, raised by you the defendants, and carried over the bridge made by you over your railway, at the mouth of the tunnel of your said railway as it approaches the river Lee, were and still are out of repair; and that of the 507 yards of said road so out of repair, 263 yards in length, and 34 feet or thereabouts in breath, throughout said length, were and are footway; and that the whole of said 343 yards of the breath, in the whole of 53 feet 4 inches or thereabouts, were and are the immediate approach to the said bridge, and the ascent to it from the westward, by means of which the said Glanmire-road, Lower, was raised by you from its old level to the level of the top of said bridge, and connected and carried over it, the said 243 yards being measured in the slope of the said road, downwards towards the west, from the western side of the said bridge, from the point where the said Glanmire-road, Lower, was and is connected therewith, and continued over the archway thereof to the eastward; and that of the said 507 yards so out of repair, 264 yards in length, and 34 feet or thereabouts in breath, throughout the said length, were and are carriage-way, and 19 feet 4 inches or thereabouts in breath, throughout the said length, were and are footway; and that the whole of the said 264 yards of the breath, in the whole of 53 feet 4 inches or thereabouts, were and are the immediate approach to the said bridge, and the ascent to it from the eastward, by means of which the said

(a) *Supra*, p. 448.

“Glanmire-road, Lower, was raised by you from the old level to the level of the top of the said bridge, and connected with, and carried over it; the said 264 yards being measured in the slope of the said road, downwards, &c., and that the whole of the said 507 yards of road, of the breadth aforesaid, were and are a necessary work connected with the said bridge, and are all situate, &c., and are in the district of the said Sir John Benson; and although you the said defendants were duly informed by a notice, bearing date the 7th December 1864, &c., you have failed and neglected, and still fail and neglect to repair same, contrary to law. This is to command,” &c.

E. T. 1865.
Queen's Bench
S. AND W.
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BENSON.

It appeared, at the hearing of this summons, that the road was made under the Special Act, 16 & 17 *Vic.*, L. & P., c. 142; that since the road was opened in 1855, the repairs had been made by the corporation; that the roadway immediately over the span of the bridge was not included in the measurement of 507 yards, inasmuch as the company have always kept, and still keep same in repair, not as an admission of liability, but to protect the archway of the bridge. The respondent sought an order under the 8 *Vic.*, c. 20 s. 65, and the Justices made one accordingly.

Jellett (with him the *Solicitor-General* and *K. C. Neligan*) now argued the case for the appellants.

This is a special road, constructed under a special Act; therefore, if the railway company have fulfilled the provisions of the 3rd section of this Act, 16 & 17 *Vic.*, c. 142, if they have constructed it to the satisfaction of the Wide-street Commissioners of the city of Cork, according to the 4th section, carrying out the provisions of the 3rd section, there their obligation ceases.—[LEFROY, C. J. You contend that by making the road, and handing it over to the corporation, they fulfilled their duty?—Yes. By this Act the road is to be constructed in a peculiar way. The ascent, in the General Act, is 1 in 30, in the Special Act, 1 in 40; no footway is required by the General Act. There is a much heavier obligation imposed upon the company, by this Special Act, as to the construction

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Queen's Bench
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of the roadway, the works being much more extensive under the Special, than under the General Act; and the Legislature having required such extensive works, did not require them to be kept in repair by the company. There is no provision that it is to be kept in repair, to the satisfaction of the Wide-street Commissioners, though it must be constructed under their care, and at the expense of the company as to such care.—[FITZGERALD, J. If constructed under 8 Vic., c. 20, you would be obliged to keep it in repair.]—Unless it comes within the code commencing at section 53. There, the company are to put it into repair, but not to keep it in repair (section 51). I do not find any authorities that bear on the case.

Goold, with him *Macdonogh*, in support of the Justices' order.

The object of the Special Act was to fix the ascent, &c., of this particular road; but there is no intention manifest to relieve the company from the obligations of the General Act. In the *North Staffordshire Railway Company v. Dale* (a) the question turned on a Special Act. So in *Leech v. North Staffordshire Railway Company* (b). All the Irish decisions bearing on the case are, *Waterford & Limerick Railway Company v. Kearney* (c); *Fosberry v. Waterford & Limerick Railway Company* (d). The obligation imposed by the Land Clauses Act is a fair and equitable one; section 14 of their private Act, expressly declares that they shall be liable to all the obligations of the General Act. ;

Macdonogh.

These provisions of the Railway Act only are in affirmance of the common law of the land. By that law, all who make a bridge are bound to maintain its approaches. The same language occurs in 22 Hen. 8, c. 5, as in the Land Clauses Act. That statute declares how the approaches are to be measured: *The Queen v. West Riding of Yorkshire* (e). The moment you leave the level, the approach to

(a) 8 Ell. & Bl. 845.

(b) 29 L. J., M. C. 150.

(c) 12 Ir. Com. Law Rep. 224.

(d) 13 Ir. Com. Law Rep. 494.

(e) 7 East. 588.

the bridge begins. In the case in *Ell. & Bl.*, it was argued that the 46th section did not apply, though the 56th did; and Lord Campbell says: "That section (56) does not apply to a bridge, but to a road where there is no bridge." (a)

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Jellett, in reply.

In the case of the *Waterford and Limerick Railway Company*, the question was, whether a roadway under a bridge was part of the approach to a bridge. The real question is, whether the special legislation brings this under the legislation as to substituted roads. These are specially legislated for.

Per Curiam.—Affirm the order of the Magistrates.

(a) 8 Ell. & Bl. p. 845.

T. T. 1864.
Common Pleas

SAYER v. BEGG.

(*Common Pleas*).

June 8, 12.

A, an importer of French brandy, complained of the following libel, contained in a letter written by B to the attorney of A, "Now, as to Mr. S., I warn him that I am willing to leave the matter to arbitration; as to his conduct, I did not say half enough; it more resembles that of a freebooter than of an honorable British merchant." In one count, which contained a preliminary inducement, the innuendo was that the conduct of the plaintiff towards defendant, in relation to defendant's advertisement, and in the negotiations, stated in the inducement, was "dishonest and dishonorable, and unworthy of an honorable British merchant." In another count, the innuendo was that plaintiff had been guilty of discreditable and dishonorable conduct in his said trade. The defendant pleaded that he had published a notice complaining of the quality of some brandy, which had got a prize medal; that plaintiff employed an attorney to write to him complaining of the publication, to which he replied that it was not plaintiff's brandy to which he referred; that thereon, the plaintiff, through his attorney, insisted, as the terms for forbearing legal proceedings against defendant, that he should procure the publication of an advertisement in commendation of plaintiff's brandies, as furnished by plaintiff, fifty times, at his own expense, and should pay plaintiff £20, otherwise that legal proceedings should be forthwith commenced. That believing said demand of £20 to be extortionate and unjust, and the other terms to be unfair, and that he had an interest in inducing the plaintiff and his attorney to abandon their said demands, he, *bona fide*, and with a view to his interests, and believing the same to be warranted by the circumstances, wrote the said letter to the plaintiff's attorney, in reply to his letter threatening proceedings.—*Held* on demurrer, to be a good plea of privileged communication.

THIS was an action of libel. The summons and plaint contained three counts; the first count stated that the plaintiff and Jean Lewis Theodore Imbaud were merchants, trading under the name, style, and firm of "George Sayer and Co.," and, as such merchants, imported from France to the United Kingdom and sold therein large quantities of French brandies; and that before said time, the plaintiff and said J. L. T. Imbaud, trading as aforesaid, had been awarded by the Commissioners of the London International Exhibition of 1862 a prize medal for the considerable merits of their brandies, and such medal bore upon it the words "*Honoris Causâ*;" and that before said time the defendant had caused to be printed and published in certain newspapers divers advertisements, containing amongst other words, the words following:—"We would recommend our friends to be cautious in ordering "spirits called prize medal brandy, as we have lately tasted some "from flasks bearing a prize medal for superior brandies, with "*Honoris Causâ*,' &c., on the labels, which are as bad stuff, under "the name of French spirits, as we ever tried;" and that before

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the said time of the committing of the grievances in this count so mentioned, the plaintiff alleged that such publication was a false, malicious, and defamatory statement of the character and nature of the brandies of the said firm; and said defendant, before and at the said time alleged that the brandy referred to by him in said advertisement, as prize medal brandy, was not any of the brandies of the said firm, but on the contrary other and different brandy; and said advertisement and allegation led to and were the subject of negotiation between plaintiff and his attorney, and defendant; and before the said time, plaintiff had consented not to take any proceedings against the defendant, in respect of such publication, in case the defendant should give to the plaintiff and J. L. T. Imbaud a written statement, in certain terms then consented to by plaintiff, and should procure for plaintiff and said J. L. T. Imbaud, a portion of the brandy referred to in said advertisements as prize medal brandy; and should pay to them £20 on account of divers expenses incurred by them, to an extent exceeding £200, by reason of defendant's said advertisements, in procuring advice, and in publishing certain counter advertisements referring to these brandies; which counter advertisements were rendered necessary or advisable by the aforesaid advertisement of the defendant: and afterwards the defendant falsely and maliciously wrote and published of the said plaintiff, and of and concerning him in his said trade, and of and concerning his conduct and dealings and negotiations with the defendant in relation to the aforesaid advertisement, the words following (amongst others), "Now, as to Mr. Sayer" (meaning the plaintiff), "I warn him that "I am willing to leave the matter to arbitration; and as to what I "said of his conduct, I did not say half enough; it more resembles "that of a freebooter than of an honorable British merchant, and "if he assails me I must defend myself with all my might. I "have been a long time dealing with English gentlemen, and "never met the like of him before:" meaning thereby that the conduct of the plaintiff towards defendant, in relation to the said advertisement, was dishonest and dishonorable, and unworthy of an honorable British merchant.

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The second count complained that, at the time of the committing of the said grievances, the plaintiff was a merchant, and as such merchant traded in the importation from France to the United Kingdom, and sold therein French brandies; and that the defendant falsely and maliciously wrote and published of the plaintiff, and of and concerning him in his trade and business as such merchant, and of and in relation to his conduct as such merchant, the words following (amongst others) "Now, as to Mr. Sayer," &c., setting out the words as before, with the innuendo "meaning that the "plaintiff had been guilty of discreditable and dishonorable conduct "in his said trade."

The third count set out the words without any innuendo.

The defendant pleaded secondly, to the several counts of the summons and plaint, that before the publication of said words the plaintiff retained and employed one Benjamin Bloomfield, gentleman, one of the attorneys, to write to the defendant threatening to commence legal proceedings against the defendant, to recover damages for an advertisement published by the defendant, and alleged by the plaintiff to be libellous, and to relate to certain brandies offered for sale by the plaintiff; and the defendant thereupon immediately apprised the plaintiff and the said Benjamin Bloomfield that the defendant did not in said advertisement allude to plaintiff's brandies; and defendant shortly afterwards, at his own expense, caused an advertisement, drawn and supplied to him by the petitioner, to be repeatedly published in each of the newspapers in which said former advertisement had appeared, stating, as the fact and truth is, that the defendant did not in said former advertisement refer to the brandies of the plaintiff, and praising the said brandies of the plaintiff as justly enjoying a large demand in Ireland. That notwithstanding the matters last aforesaid, as well the plaintiff as the said Benjamin Bloomfield, by letter addressed to the defendant, threatened to take legal proceedings against the defendant, in respect of said first mentioned advertisement, unless the defendant would accede to certain other terms demanded by plaintiff and said Benjamin Bloomfield on his behalf; and one, amongst other things, that defendant should procure the

publication of said advertisement so furnished by plaintiff fifty times, at his own expense, and should pay to the plaintiff a sum of £20. That in reference to said original threat, and the subsequent demand, &c., of the plaintiff and said Benjamin Bloomfield, the defendant applied by letter to plaintiff, and also applied to Messrs. W. & Co., who acted as agents for the plaintiff in Dublin, and both the said plaintiff and Messrs. W. & Co. referred the defendant to said Benjamin Bloomfield, the plaintiff's attorney, as the person to be communicated with on the subject aforesaid. That defendant had communications with said Benjamin Bloomfield, and complained to him of the said plaintiff, and the terms so demanded; and said Benjamin Bloomfield, as the attorney and agent of plaintiff, and duly authorised by plaintiff in this behalf, wrote to defendant threatening immediate proceedings at law against the defendant, because the said sum of £20 was not paid, and said other terms so demanded by the plaintiff were not fulfilled by the defendant. That the defendant *bona fide* believed the said demand of said sum of £20 to be extortionate and unjust; and the said other terms so sought to be exacted, and the said threats of legal proceedings, to be unfair and unreasonable, and unworthy of the plaintiff. That the defendant had an interest in endeavouring to induce the plaintiff and said Benjamin Bloomfield to abandon said demand of £20, and to cease to exact said other terms from defendant, and to abstain from taking legal proceedings against the defendant. That the said Benjamin Bloomfield was, under the circumstances aforesaid, likewise interested in the matters aforesaid, as the said plaintiff's attorney, and the person so communicating with the defendant in reference thereto. That the defendant, acting *bona fide* in the conduct of his own affairs, in matters where his interests are as aforesaid concerned, and with a view to his interests, and in the hope of inducing the plaintiff and said Benjamin Bloomfield, as his attorney, to abandon said demand of £20, and said other terms, and his threat of taking legal proceedings against defendant, and in respect to what was written to the defendant by said Benjamin Bloomfield, in relation to the matter aforesaid, and for the purpose of remonstrating and

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protesting against said demand of £20, and against said other terms demanded by plaintiff, and said threats of legal proceedings, and *bona fide* believing such remonstrance and protest to be warranted by the circumstances, wrote and published the words in the summons and plaint mentioned, without express malice. And the defendant did not further publish the same than by sending the letter in which the same were contained to the said Benjamin Bloomfield, who was as aforesaid immediately interested in the said matters hereinbefore mentioned.

To this defence, so far as same related to the first and second counts, the plaintiff demurred, on the following grounds:—that it disclosed no privileged occasion, nor any occasion entitling defendant to libel plaintiff in his trade; and because of the want of an averment that defendant had reasonable grounds for believing what he said of the plaintiff to be true.

Palles (with whom was Sergeant *Armstrong*), in support of the demurrer.

The defence does not disclose any privileged occasion. The words here were wholly unwarranted by or connected with the circumstances; consequently the rule that excess is merely evidence of malice, and does not destroy the privilege, does not apply to this case.

He cited *Evans v. Harlow* (a); *Ede v. Scott* (b); *Huntley v. Ward* (c); *Turner v. Evans* (d); *Lewis v. Clements* (e).

Devitt and J. E. Walsh, contra.

The demurrer being confined to the plea, so far as it is an answer to the first and second counts, it is admitted that it is good as a defence to the third count, which has no innuendo. The defence is a good plea of privileged occasion. The letter appears to have been written *bona fide*, by a person having an interest, to another having a corresponding interest in the subject-matter, and does not travel out of

(a) 5 Q. B. 624.

(b) 7 Ir. Com. Law Rep. 60.

(c) 6 C. B., N. S., 504.

(d) 12 Ad. & EL 733.

(e) 3 B. & Ald. 702

it. The question of excess was merely for the jury: *Toogood v. T. T. 1864.*
Spyring (a); *Hopwood v. Thorn (b)*; *Carr v. Duckett (c)*; *Hal-*
loran v. Thompson (d); *Murphy v. Kellett (e)*; *Carr v. Hood (f)*; *Common Pleas*
Paris v. Levy (g); *Seymour v. Butterworth (h)*; *Morrison v. Bel-*
cher (i); *Beatson v. Skene (k)*; *Harrison v. Bush (l)*; *Cooke v.*
Wildes (m); *Whiteley v. Adams (n)*; *Fryer v. Kinnersley (o)*; *SAYER*
Campbell v. Spottiswood (p); *Jackson v. Hopperton (q)*; *Robertson*
v. M'Dougall (r). *v.*
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Armstrong, replied.

Cur. ad. vult.

MONAHAN, C. J.

This case comes before the Court on demurrer to the defendant's plea of having written the alleged libel complained of, on a privileged occasion. The facts are shortly as follow:—The plaintiff is a wine and brandy merchant, who obtained a prize medal for some brandy exhibited by him at the London Exhibition. The defendant is also a wine and spirit merchant; and he had published, in some of the Dublin newspapers, a letter or article cautioning the public against the prize medal brandy, which he stated to be as vile trash as he had ever tasted. The plaintiff assumed that it was to his brandy the defendant alluded; and through his attorney, Mr. Bloomfield, threatened to take legal proceedings against him for what he supposed was a libel on his brandy. The defendant, in answer to Mr. Bloomfield's letter, wrote to him assuring him that it was not to the plaintiff's brandy he alluded, but to other brandy, to the exhibitor of which some prize had been awarded. After some negotiation it was arranged that the defendant should write an

June 12.

(a) 1 C. M. & R. 193.

(b) 8 C. B. 293.

(c) 5 H. & N. 783.

(d) 14 Ir. Com. Law Rep. 334.

(e) 13 Ir. Com. Law Rep. 486.

(f) 1 Camp. 355.

(g) 2 F. & F. 71.

(h) 3 F. & F. 372.

(i) 3 F. & F. 614.

(k) 5 H. & N. 898.

(l) 5 E. & Bl. 344.

(m) 5 El. & Bl. 328.

(n) 15 C. B., N. S., 392.

(o) 15 C. B., N. S. 422.

(p) 3 B. & S. 769.

(q) 4 N. R. 242.

(r) 4 Bing. 670.

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explanatory letter, to the effect that it was not to plaintiff's brandy he had alluded, and that this letter should be published in the newspapers, and that a sum of money should be paid by the defendant to the plaintiff, to reimburse him in the legal expenses he had been put to in relation to the alleged libel on his brandy. After some further negotiation plaintiff's attorney claimed a sum of £20 for those expenses, and also mentioned the names of several newspapers in which he required the defendant's letter to be published, at the defendant's expense. The defendant was dissatisfied with so large a sum as £20 being claimed by Mr. Bloomfield; and I believe he also considered the number of papers in which he required defendant's letters to be published excessive; and he wrote to the plaintiff to that effect. The plaintiff, who resides I believe in London, in reply referred the defendant to his attorney, Mr. Bloomfield. The defendant, being so referred by the plaintiff to Mr. Bloomfield, wrote to him the letter the subject of the present action, in answer to one from Mr. Bloomfield, threatening to proceed with the former action, in consequence of the defendant not having performed the arrangement entered into. The part of the defendant's letter to Mr. Bloomfield, complained of by the plaintiff, is as follows:—"Now, as to Mr. Sayer, I assure him that I am "willing to leave the matter to arbitration; and, as to what I said "of his conduct, I did not say half enough of it; it more resembles "that of a freebooter than of an honorable British merchant. If he "assails me, I will defend myself with all my might. I have been "for a long time dealing with English gentlemen, and never met "the like of him before." In the first count the meaning assigned to these words is, that the conduct of the plaintiff towards the defendant, in relation to said advertisements and negotiations, was dishonest and dishonorable, and unworthy of an honorable British merchant. The second count states the meaning to be, that the plaintiff had been guilty of discreditable and dishonorable conduct in his said trade.

Defendant's plea, which has been demurred to, has been pleaded to both counts of the summons and plaint; but, according to a recent decision of the Court of Error, may be taken distributively

as a separate plea to each count, and so it was dealt with during the argument; neither was there any formal objection taken to the form of the plea, which contains all the usual averments. As to the occasion being privileged, we entertain no doubt. In more than one case in this Court we held that a letter written by a party threatened to be sued, to the attorney of the party about suing him, was a letter written on a privileged occasion. In so deciding, we only followed English cases. The only difficulty we felt in the present case arose altogether from the innuendo, "meaning that the plaintiff had been guilty of discreditable and dishonorable conduct in his said trade." It is clearly settled that, in pleading a justification or a privileged communication, the defendant is bound to adopt the meaning attributed to the words by the plaintiff's pleader; and therefore, in the present case, if we thought that the fair meaning of the innuendo was, that the plaintiff had been guilty of misconduct in his mode of buying and selling as a merchant, we should have held the plea a bad one, as the misconduct alleged would in that case have been totally unconnected with the particular transaction in which the defendant was interested; but, after giving the matter the best consideration in our power, we have come to the conclusion that the fair meaning of the innuendo is, what also is the meaning of the libel complained of, that in the particular transaction with the defendant the plaintiff was guilty of discreditable and dishonorable conduct in his trade; that is, by endeavouring to extort from the defendant unfair and unreasonable terms for the publication of a matter connected with the plaintiff's trade—for instance requiring as for expenses a much larger sum than was really expended; and, if we are right in the construction of the innuendo, the only objection to defendant's plea would be, that the defendant's language was too violent, and not called for by the occasion. The objection to a plea of privileged communication we have frequently had occasion to consider in this Court, particularly in the case of *Ruckley v. Kiernan* (a), in which we held, on the authority of the case of *Cooke v. Wildes* (b) that where the libellous words complained of are connected with the matter giving rise to the

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(a) 7 Ir. Com. Law Rep. 75.
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(b) 5 Ell. & Bl. 344.
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privileged communication, that mere excess—as, for instance, attributing perjury to the party, when probably such would be never suited to the occasion—did not render the plea demurrable; but that the excess might be viewed as evidence of malice before the jury. I am aware that, in the very recent case of *Fryer v. Kinnersley* (a), the Court of Common Pleas appear to have held that a communication, otherwise privileged, was deprived of its privilege on account of excess, though in a matter germane to the subject-matter. But, with great deference to that Court, we do not think that the case of *Fryer v. Kinnersley* can be considered as overruling the well-considered case of *Cooke v. Wildes*. The attention of the Court of Common Pleas does not appear to have been directed to the case of *Cooke v. Wildes*; the point argued was simply whether the occasion was a privileged one.

On the whole, therefore, though this case before us is not quite free from difficulty, we are of opinion that the libel complained of is connected with the occasion, and that any excess in the language can be used only as evidence of malice before the jury, and not as rendering the defence bad on demurrer.

Demurrer overruled.

(a) 15 C. B., N. S., 422.

WILSON v. MARSHALL.*

May 31.
June 8.

THIS was an action on a guaranty. The summons and plaint contained six counts. The first was a special count on the guaranty; the others were the common *indebitatus* counts; viz., The defendant undertook to see the plaintiff paid for certain goods supplied by him to A, at the defendant's request. After the goods had been supplied, and A had made default in payment, the defendant acknowledged his liability under the guaranty, and promised to pay the plaintiff the price of the goods. Neither the guaranty nor the subsequent promise were in writing.

Held, that the plaintiff was entitled to recover on an account stated.

* Before MONAHAN, C. J., and CHRISTIAN, J.

for goods bargained and sold; for goods sold and delivered; for money paid, &c.; for money lent; and the sixth on accounts stated. The defendant traversed the causes of action contained in the several counts of the plaint respectively, and issues were joined on those traverses.

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The case was tried before the Hon. Mr. Justice Hayes, at the Londonderry Spring Assizes 1864. The following evidence was given by the plaintiff, who was a flax-seed merchant, in the city of Londonderry:—That in the month of April 1861, the plaintiff received a message from the defendant, requesting him to keep a quantity of flax-seed for a person of the name of Browne; that in the month of May following, the defendant and Browne called for the flax-seed, which was then delivered to Browne, at the request of the defendant, who then undertook to see the plaintiff paid for it, but no written guaranty was given by the defendant to the plaintiff. Browne subsequently left the country without paying for the flax-seed, and the defendant, in answer to applications by the plaintiff for payment, frequently promised to pay the amount, and acknowledged his liability. The defendant called no witnesses, but relied on the evidence, as showing that the defendant was only a surety, and that Browne was the principal; and that, as the guaranty was not in writing, the plaintiff could not recover.

Counsel for the plaintiff then called on the learned Judge to direct a verdict for him on the sixth issue, viz., the issue on the account stated, on the following grounds: that the evidence established that a verbal guaranty had been given by the defendant; that the goods had been delivered to Browne on the faith of that guaranty; and that after Browne had failed to pay for the goods, the defendant had admitted his liability, and promised to pay the amount: and they cited *Cocking v. Ward* (a), and *Rainsford v. Eager* (b).

His Lordship refused to direct the jury as required by the plaintiff, but left to them the following questions; first, were the goods sold to the defendant or to Browne? and secondly, was the liability of the defendant primary or secondary? The jury found that the goods were sold to Browne; and that the liability of

(a) 1 C. B. 858.

(b) 3 Ir. Com. Law Rep. 120.

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the defendant was secondary, as surety for Browne. His Lordship thereupon directed a verdict for the defendant on all the issues; but reserved leave to the plaintiff to move to have that verdict set aside, and a verdict entered for him on the sixth issue, if the Court above should be of opinion that he (the learned Judge) should have so directed.

Dowse, having in Easter Term obtained a conditional order to set aside the verdict had for the defendant, and enter up verdict for the plaintiff, pursuant to leave reserved—

Brooke and *Carson*, now showed cause.

Dowse, and *J. P. Hamilton*, in support of the conditional order.

Brooke.

This was a promise to answer “for the debt, default, or mis-carriage of another person,” and is, therefore, within the Statute of Frauds. This has never ceased to be the debt of Browne; the subsequent promise did not alter the nature of the defendant's liability: *Matson v. Wharam* (a). It cannot be regarded as the debt of both: *Marriott v. Lister* (b). The liability of the defendant never lost its secondary character; he never ceased to be a surety. In *Eastwood v. Kenyon* (c), Mr. Cresswell *arguendo* says:—“Suppose A gives a parol guaranty to a tradesman, to induce “him to supply goods to another, can A be made liable on a “subsequent parol promise? Such a construction would defeat “the statute; yet the case is in principle the same as the present, “and the moral obligation much stronger.” *Cocking v. Ward* (d) was relied on by the plaintiff at the trial; but in that case the defendant had got into possession of the lands before the second promise, and at the time it was made was actually in possession; and the decision was founded on the case of *Knowles v. Michel* (e), which was decided on the ground that the nature of the property had changed before the second promise; for as long as the trees

(a) 2 T. R. 80.

(b) 2 Wilson, 141.

(c) 11 Ad. & Ell. 438.

(d) 1 C. B. 858.

(e) 13 East. 249.

were standing they were part of the realty, but when they were felled they became personalty.

At the time of the second promise, the consideration was *executed*, for the goods had been delivered to Browne, and therefore there was no sufficient consideration to support the subsequent promise.

The Courts should not permit the Statute of Frauds to be frittered away, but, on the contrary, should be astute in upholding its policy. To exclude a case of this kind from the operation of the statute, would be virtually to repeal that Act, and let in all the mischief which its provisions were intended to prevent.

He cited *Hopkins v. Logan* (a); *Gough v. Findon* (b); *Lemere v. Elliott* (c).

Dowse and J. P. Hamilton.

Assuming that the plaintiff cannot recover on the special count, he is entitled to have the verdict entered for him on the issue on the account stated.

By the traverse of the account stated, two things are put in issue; first, the statement of the account; and secondly the consideration.

Here there was clearly a statement of an account, for an account may be stated on a single item: *Newhall v. Holt* (d); *Arthur v. Dartch* (e); *Rainsford v. Eager* (f). In *Knowles v. Michel* (g) it was held, that if there be an acknowledgment by the defendant of a debt due on any account, it is sufficient to enable the plaintiff to recover on an account stated.

As to the consideration. It is said that the consideration was *executed* at the time of the subsequent promise, and therefore not sufficient to support it. The sufficiency of the consideration may be tested in this way; suppose the defendant had paid the amount

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(a) 5 M. & W. 241.

(b) 7 Exch. 48.

(c) 6 H. & N. 656; S. C. 7 Jur., N. S., 1206.

(d) 6 M. & W. 662.

(e) 8 Jur., N. S., 118.

(f) 3 Ir. Com. Law Rep. 120.

(g) *Ubi supra*.

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claimed by the plaintiff, could he have recovered it back as on a failure of consideration? If he could not, then there was a consideration, and one sufficient to support the subsequent express promise. In *Sweet v. Lee* (a) it was held that money could not be recovered back which had been paid under a contract void by the Statute of Frauds. But here there is abundance to support the subsequent promise; first there is the previous request; then performance by the plaintiff on that request; then there is the consideration moving from the plaintiff; and lastly, the subsequent express promise.

Before the Statute of Frauds, a promise to answer for the debt, default, or miscarriage of another was a good promise without writing, and could be enforced. The Statute of Frauds does not affect the legality of the contract. That statute is a statute of evidence; it does not affect the contract itself, but only the evidence by which it is sought to be supported. In *Crosby v. Wadsworth* (b), Lord Ellenborough says, "The Statute of Frauds does not vacate such contracts, if made by parol." *Lee v. Muggeridge* (c) goes the length of this, that a moral obligation is sufficient to support a subsequent express promise; in that case, Mansfield, C., J. says, "It has been long established, that "where a person is bound morally and conscientiously to pay a "debt, though not legally bound, a subsequent promise to pay will "give a right of action." And Heath, J., says, "The notion that a "promise may be supported by a moral obligation is not modern; "in Charles the Second's time, it was said that if there be an iota "of equity, it is enough consideration for the promise." In *Eastwood v. Kenyon* (d), Lord Denman, C. J., approves of the note to *Wennall v. Adney* (e), and says, "Most of the older cases on this "subject, are collected in a learned note to the case of *Wennall v. Adney*, and the conclusion there arrived at seems to be correct in "general, 'that an express promise can only revive a precedent "good consideration, which might have been enforced at law,

(a) 3 M. & Gr. 452.

(b) 6 East. 602.

(c) 5 Taunt. 36.

(d) 11 Ad. & Ell. 438.

(e) 3 Bos. & Pul. 247.

“through the medium of an implied promise, had it not been
 “suspended by some positive rule of law; but can give no original
 “cause of action, if the obligation on which it is founded never
 “could have been enforced at law, though not barred by any legal
 “maxim or statute provision.” In *Seago v. Deane* (a), Gaselee, J.,
 says, “This was a contract independent of the lease, and it is clear
 “that though a party be not bound by a contract, yet, if he make a
 “promise after it has been performed, he is liable on an account
 “stated.”

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Dawson v. Remnant (b) is a case strongly in favor of the plaintiff. That was an action for the amount of a tavern bill, and the declaration contained a count on an account stated. Some of the items of the bill would not have been recoverable on account of the Tippling Acts. It was proved that, on the settlement of accounts between plaintiff and defendant (there being cross demands between them), these items were included in the plaintiff's demand, without objection on the part of the defendant; and a balance struck on the foot of that account in favor of the plaintiff. It was contended by the defendant, that his cross demand, which was in the nature of a set-off, was to be taken in the nature of payment, and should be applied to those items only of the plaintiff's demand which could be legally enforced; but Mansfield, C. J., ruled that the settlement of the account was conclusive, and that the plaintiff was entitled to recover.

In *Chitty on Contracts* 7th ed., p. 43, it is said:—“A promise
 “in writing, to pay a debt already incurred by a third person, is not
 “available, unless it be made on a new consideration, such as
 “forbearance; but if the credit were originally given to the third
 “person at the promiser's request, this might constitute a sufficient
 “consideration for his subsequent guarantee.” In 1 *Selwyn's Nisi Prius*, p. 115, it is said:—“Although no action might lie on the
 “original debt or contract, from the deficiency of legal evidence
 “to support it, *e. g.*, for want of its being in writing, under the
 “Statute of Frauds, yet it may, on the admission upon an account

(a) 4 Bing. 459.

(b) 6 Esp. 24.

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Cocking v. Ward (a) is exactly in point. In that case the defendant verbally promised the plaintiff that, if she would give up possession of a farm which she was in the occupation of, and would induce her landlord to accept the defendant as a tenant, he would pay her £100. The plaintiff gave up possession of the farm to the defendant, and requested her landlord to accept the defendant as tenant, which he did. The defendant afterwards admitted his liability under the agreement, but failed to pay the £100, and an action was brought for that sum. The declaration contained a special count on the agreement, and also a count on an account stated. It was contended by the defendant, that the agreement, being for the sale of an interest in land, could not be proved without writing; while the plaintiff insisted that there was sufficient evidence to support the count on an account stated. It was held that the evidence was sufficient; and Tindal, C. J., says, "The plaintiff, therefore, failing upon the special contract, the "remaining question is, whether she is in a condition to recover "the £100 under the count upon an account stated? There was "distinct evidence in this case, that after the plaintiff had given "up the possession, and after the defendant had succeeded to it "through the plaintiff's application to the landlord, the defendant "admitted that he owed the £100 to the plaintiff. And this appears "to us to be sufficient evidence to enable the plaintiff to recover "on the account stated."

In *Porter v. Cooper* (b), Alderson, B., says, at p. 395, "The "admission of a certain sum being due, in respect of a demand for "which an action would lie, is evidence sufficient to support a count "on an account stated." In *Kennedy v. Brown* (c) all that was held was, that where there was any illegality or immorality in the consideration, a claim founded on such consideration could not be relied on in support of a count on an account stated. *Gough v. Findon* (d), cited by Mr. Brooke, was decided on the ground that

(a) *Ubi supra*.

(b) 1 Cr. M. & R. 387.

(c) 13 C. B., N. S., 677.

(d) *Ubi supra*.

no liability ever existed; and in *Hopkins v. Logan* (a), the promise laid in the declaration was to pay *in futuro*, for which there was no consideration. *Lemere v. Elliott* (b) was decided on the same ground as *Hopkins v. Logan*; and in that case Martin, B., says, "Here there was no debt whatever. Supposing there was a part performance of the agreement, that is nothing more than an executory contract, to be performed by the sale of the house and business; and so long as it remained unexecuted, there is no consideration for an account stated."

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Again, the second promise may be looked upon as a promise by the defendant to pay a debt of his own, for he had, by the original promise, rendered himself liable at Common Law.

They cited *Laycock v. Pickles* (c); *Lampleith v. Brathwait* (d); *Pinchon v. Chilcott* (e); 2 *Story on Contracts*, p. 393; *Trueman v. Fenton* (f); *Kirkpatrick v. Tattersall* (g); *Foster v. Allanson* (h).

Carson, in reply.

The jury have found that the liability of the defendant was always of a secondary character, and as surety for Browne. The jury are the proper tribunal to determine that question; and if they find that the undertaking was a collateral one, the plaintiff cannot recover on an *indebitatus* count. In 1 *Williams' Saunders*, 2 b., it is said: "It is often the subject of inquiry at Nisi Prius, to whom the credit was given; and such nice distinctions have been taken on the wording of the promise as to make it impossible to lay down any precise rule of construction, but the jury must determine to whom the credit was given. *Bull. N. P.*, p. 281: "If it appears that the credit was given to the defendant, that is, if the goods, &c., were really sold to him, though delivered to another, the statute is then out of case. But if it appears that the person for whose use the goods were furnished is liable, and a sufficient promise in writing by the defendant to pay the debt is

(a) *Ubi supra*.

(c) 10 Jur., N. S., 336.

(e) 3 C. & P. 236.

(g) 13 M. & W. 766.

(b) *Ubi supra*.

(d) 1 Sm. L. C. 140.

(f) Cowp. 544.

(h) 2 T. R. 479.

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"produced, though the plaintiff will then be entitled to recover, yet
"it can only be upon a special action of *assumpsit*, stating the
"particular circumstances of the promise, and not upon a general
"*indebitatus assumpsit* for goods sold and delivered to defendant,
"or for goods sold to defendant, and delivered to another at defend-
"ant's request, or for goods sold and delivered to another person at
"defendant's request." And for that he cites several authorities.
In *Rozier v. Rozier* (a), there was an *indebitatus* count for goods sold
and delivered to a third person, at the request of the defendant; the
defendant pleaded *non-assumpsit*; and it was held that, the promise
being collateral, it did make a debt, but should have been brought
as an action on the case.

In *Addison on Contracts*, p. 36, it is said: "A distinction was
"formerly taken between a promise to pay for goods supplied to a
"third party, made before and after the delivery of such goods.
"The former was held to be an original undertaking, and so not
"within the statute, and the latter a collateral undertaking within
"the statute; but this distinction has been decisively overruled,
"and it is now holden, that if the person for whose use the goods
"have been furnished is liable at all, any promise by a third person
"to pay for them is a promise to answer for the debt of another,
"and must be authenticated by writing, pursuant to the statute."

No case has been cited like the present, where the original
contract was to answer for the debt or default of another; in all the
cases referred to, the original transaction was between the parties
themselves, and the original liability was a primary one.

This is an attempt to make two counts of *assumpsit* out of one
promise; one on a guaranty, to pay the debt of another; the other
on an *indebitatus assumpsit*, to pay a debt of the defendant's own.
He cited *Gould v. Coombe* (b).

Cur. adv. vult.

June 8.

On this day, MONAHAN, C. J. delivered the judgment of the
Court.

(a) 2 Vent. 36

(b) 1 M. & Gr. 543; S. C. 14, L. J., C. P., 145.

[His Lordship stated the facts of the case].—The question is, whether an action for an account stated can be maintained against the defendant, who, having given a verbal guaranty to the plaintiff for goods to be supplied to a third person, and which goods were supplied on the faith of the guaranty, after they were so supplied, promised the plaintiff to pay the amount. There is no doubt but that in substance the plaintiff seeks to recover from the defendant a debt due by a third person, for which that person is liable, and that the defendant has given no written promise; and, as has been truly said by the defendant's Counsel, this case may be thought to come within the mischief recited in the Statute of Frauds. But though this is so—and for myself I may say, if I did not consider myself bound by authority, I should require further consideration before I decided that the defendant was liable in the present case;—yet, after considering the case with all the attention in our power, my Brother CHRISTIAN and myself are unable to distinguish this case, in principle, from the case of *Cocking v. Ward* (a). In that case there was a verbal agreement between the plaintiff and the defendant, that if the plaintiff would surrender to her landlord a farm which she held from year to year, and induce the landlord to make a new letting to the defendant, he the defendant would pay the plaintiff £100. The plaintiff did everything on her part; she surrendered her farm, and induced the landlord to accept the defendant as tenant. The defendant got the farm, and promised to pay the £100, for which the action was brought. It was held that the plaintiff could not recover in the special count, but was entitled to recover on an account stated; and Tyndal, C. J., at page 868, says:—"The plaintiff therefore failing upon the special contract, the remaining question is whether she is in a condition to recover the £100 under the count upon an account stated. There was distinct evidence in this case that, after the plaintiff had given up the possession, and after the defendant had succeeded to it through the plaintiff's application to the landlord, the defendant admitted that he owed the £100

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(a) *Ubi supra.*

T. T. 1864. "to the plaintiff; and this appears to us to be sufficient evidence
Common Pleas. "to enable the plaintiff to recover on the account stated."

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In *Seago v. Deane* (a) the defendant agreed to allow the plaintiff £20, to make certain repairs, if she became his tenant under a lease. She did so; but nothing was said about the repairs in the lease. The defendant subsequently promised to pay for the repairs. It was held that the defendant was liable on an account stated; and Gaselee, J., says:—"This was a contract independent of the lease; and it is clear that, though a party be not bound by a contract, yet, if he make a promise after it has been performed, he is liable on an account stated." But, if the case be considered on principle, a good deal may be said to show that it is not within the Statute of Frauds. In *Porter v. Cooper* (b), Alderson, B., says:—"The cases have come to this, that an admission of a certain sum being due in respect of a demand for which an action would lie, is evidence sufficient to support a count on an account stated." In *Lemere v. Elliott* (c), the rule laid down in *Porter v. Cooper* is approved of by the Court; Martin, B., saying "There must be an admission of a debt due." In that case plaintiff failed, as the I O U was given as a deposit on a contract for purchase, which afterwards failed or went off. So, in *Middleditch v. Ellis* (d), it is decided that, though an account is settled on foot of a deed, and the balance ascertained, an account stated will not lie, for the nature of the debt is not changed. In *Goold v. Coombe* (e) four parties joined in a promissory note to secure a debt due by one. On the death of one of the sureties, the note was given to the principal to get it signed by another surety, the principal and defendant giving an I O U for the amount. It was held that the defendant was liable on an account stated, though not on the note, it having been altered: and Erle, J., certainly says:—"If defendant's liability had been merely a collateral liability, it would not have supported the count on an account stated." I confess I cannot follow

(a) 4 Bing. 409.

(b) 1 C., M. & R. 395.

(c) 6 H. & N. 656.

(d) 2 Exch. 623.

(e) 1 C. B. 543.

this *dictum*; for if there had been a written guaranty, under which defendant was liable, I do not see what was to prevent the parties settling their liability on foot of it. Independently of the account stated, it seems within the rule in the *note* to the case of *Wennall v. Adney* (a), cited with approbation by Lord Denman, in *Eastwood v. Kenyon* (b):—"That an express promise "can only revive a precedent good consideration, which might "have been enforced at law through the medium of an implied "promise, had it not been suspended by some positive rule of "law; but can give no original cause of action, if the obligation on which it is founded never could have been enforced at "law; though not barred by any legal maxim or statute provision." It appears to me this case comes within that rule. Here, there was clearly a legal liability on the part of the defendant under his guaranty, which the Statute of Frauds did not vacate or annul, but rendered it incapable of being enforced for want of legal evidence. *The Earl of Falmouth v. Thomas* (c) does not conflict with the case in 1 *Com. Bench*, as from the rejoinder it appeared that at the time of the account settled the crops were still unsecured, and therefore there was no consideration for the promise.

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(a) 3 B. & P. 249.

(b) 11 A. & E. 447

(c) 1 C. & M. 89.

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April 23.
 May 7.

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The defendant, who was superintendent of a cemetery, and required certain books and printed forms for carrying on the business of the cemetery, applied to A to procure them for him. A applied to the plaintiff to execute the order. The plaintiff, who was a stationer and printer, and who had been in the habit of supplying to A books and forms of the kind required, received from A an order for "one of each of the large books, and as few as possible of the small forms." The plaintiff sent a greater number of the large books than were ordered, and a number of the small forms, which the jury found to be in excess of the order; and also a quantity of stationery. The defendant refused to receive any part of the goods sent, on the ground that they were not according to order. At the trial the Judge refused to nonsuit the plaintiff, or direct a verdict for the defendant, but left to the jury the question, whether A was the agent of the defendant for the purpose of accepting the goods; and, if so, whether there was an acceptance of the goods by him. The jury found that A was the defendant's agent; and they brought in a verdict for the plaintiff for the price of the goods which they found that A had had authority to order, and did actually order.

The summons and plaint in this case contained the common *indebitatus* counts for goods bargained and sold, for goods sold and delivered, and on an account stated. The defendant traversed the causes of action contained in the several paragraphs of the summons and plaint respectively; and issues were joined on those traverses.

The case was tried before the Hon. Mr. Justice O'BRIEN, at the Consolidated Nisi Prius Sittings during Michaelmas Term 1863. It appeared that the defendant, the Rev. Nicholas Barlow, was the principal manager of the Roman-catholic cemetery at Sheffield, and that the plaintiff was a printer and stationer residing in Dublin. In the month of August 1862 the defendant came to Dublin, and called on Mr. Phelan, who was the superintendent of the Glasnevin cemetery, near Dublin; and on that occasion the defendant directed Phelan to procure for him certain books and forms similar to those used in the Glasnevin cemetery. These books and forms were intended to be used in the Sheffield cemetery. Mr. Phelan suggested that the plaintiff, who was in

On motion for a new trial, on the ground of misdirection—

Held, that, assuming there was an acceptance by A to satisfy the Statute of Frauds, that did not preclude the defendant from rejecting the goods, on the ground that they were not according to the order.

Held (dissentiente CHRISTIAN, J.), that, as the plaintiff had sent goods in excess of the order, the defendant was not bound to select and accept such part of the goods as corresponded with the order.

That, consequently, the defendant was justified in his refusal to receive any part of the goods; and therefore that there should be a new trial.

Levy v. Green (8 Ell. & Bl. 575; S. C., on appeal, 1 Ell. & Ell. 969) followed.

the habit of printing books and forms of the description required for the Glasnevin cemetery, should be employed to make up the order; and, accordingly, an order was given by Mr. Phelan to the plaintiff for "one copy of each of the large books, and as few as possible of the small forms." There was some discrepancy in the evidence as to the precise terms of the order; but, for the purposes of the case, it may be taken that the order was given in the terms stated above. By the direction of the defendant, Phelan was to receive the goods, and forward them to a particular address at Sheffield. The plaintiff made up the order, and sent the goods to Phelan, accompanied by an invoice (a copy of which is given below).* Phelan, accordingly, forwarded the goods and the

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* "COPY OF THE INVOICE.

			£	s.	d.
$\frac{1}{2}$ Qr. Pot paper, 3d., 2 black-lead pencils, 3d.	0	0 6
2 Registers	37s. 6d.	3	15 0
2 Workmens' account books ...	...	27s. 6d. ...	...	2	15 0
1 Cash book ...	...	...	...	0	18 0
1 Perpetuity cash book ...	...	...	...	1	0 0
1 Renewal book ...	...	...	...	1	10 0
1 Map book ...	...	...	...	2	10 0
20 General ground docket books ...	...	4s. ...	...	4	0 0
10 Dressing grave books ...	...	3s. ...	...	1	10 0
5 Certificate docket books ...	...	5s. ...	...	1	5 0
5 Monumental docket books ...	...	3s. ...	...	0	15 0
5 Foundation wall books ...	...	3s. ...	...	0	15 0
5 Headstone books ...	...	3s. ...	...	0	15 0
2 Vault docket books ...	...	4s. 6d. ...	...	0	9 0
2 Removal docket books ...	...	4s. 6d. ...	...	0	9 0
5 Railing books ...	...	3s. ...	...	0	15 0
200 Weekly returns ...	...	5s. per hundred	...	0	10 0
500 Requirement dockets ...	...	2s. 6d. per do.	...	0	5 0
700 Perpetuity sheets ...	...	5s. per do.	...	1	15 0
200 Report sheets ...	...	5s. 4d. per do.	...	0	10 8
200 Perpetuity returns ...	...	9s. per do.	...	0	18 0
2 Reams c. l. note, headed ...	...	8s. 6d. ...	...	0	17 0
1 — — plain ...	...	...	...	0	6 0
1 — Cap ...	...	...	...	0	10 0
1 — do faint ...	...	...	...	0	11 0
1 — do pott, plain ...	...	...	...	0	8 6
1 — do. faint ...	...	...	...	0	9 0
1 — Letter ...	...	...	...	0	13 0
$\frac{1}{4}$ — Best blotting ...	...	40s. ...	...	0	10 0
1 — C. L. ens., No. 4, @ 6d.; No. 6, @ 8d. ...	...	...	...	0	14 0
6 Boxes Perry's pens, 6s.; 6 Gillott's, 7s. 6d. ...	...	...	...	0	13 6

K. T. 1864. invoice to the address at Sheffield, as directed by the defendant.
Common Pleas, On the 20th of September 1862 the defendant received the invoice
SHANNON (the goods having then arrived at Sheffield); and on that day the
v. defendant wrote the following letter to the plaintiff:—
BARLOW.

“90 Garden-street, Sheffield. Saturday, September 20th, 1862.”

“SIR—I beg leave to inform you that goods directed to me by
 “you, not being according to order, remain at the Sheffield railway
 “station, at your risk.—Your obedient servant, N. BARLOW.”

The goods were never afterwards accepted by the defendant. Phelan, who was examined on behalf of the plaintiff, gave evidence as to the terms of the order, the extent of the authority which he had received from the defendant to accept the goods, and the meaning (as he understood it) of the expression “as few as possible of the small forms,” in the order. Evidence was also given by the plaintiff of the value and price of the articles included in the invoice; and the plaintiff contended that, if the jury should find that a larger quantity of the goods were sent than what were ordered, they should increase the price of certain articles, *e. g.*, the

1 Dozen black-lead pencils, 1d. ; 1 lb. black wax, 4s. .	...	...	0	5	0
2 Packing cases	...	...	0	2	6
			£33	7	2

COPY OF THE LIST MADE OUT BY THE JURY.

	£	s.	d.
1 Register book	...	...	2 10 0
1 Workmens' account book	...	...	1 17 6
1 Cash book	...	...	0 18 0
1 Perpetuity book	...	...	1 0 0
1 Renewal book	...	...	1 10 0
1 Map book	...	...	2 10 0
4 General ground docket books	...	...	1 12 0
4 Dressing grave books	...	...	0 18 0
1 Certificate docket book	...	...	0 10 0
1 Monument docket book	...	...	0 6 0
5 Headstone books	...	...	0 15 0
2 Vault docket books	...	...	0 9 0
1 Renewal docket book	...	...	0 6 6
5 Railing books	...	...	0 15 0
200 Weekly returns	...	...	0 10 0
100 Requirement dockets	...	...	0 7 6
100 Perpetuity sheets	...	...	0 10 0
100 Report sheets	...	...	0 7 6
100 Perpetuity returns	...	...	0 12 6
	£18	4	6

books of printed forms, above the invoice price, on the ground that it was proportionally more expensive to make up one of such books than two or more of them.

The facts of the case, and the result of the evidence, are so fully given in the judgment of the LORD CHIEF JUSTICE that it is not necessary to set them out at length.

At the close of the plaintiff's case, the defendant called upon the learned Judge for a nonsuit, on the following grounds—first, that there was no evidence of acceptance of the goods by the defendant to satisfy the Statute of Frauds; and, secondly, that there was at all events an excess in the quantity of the goods sent over what was ordered, and that there was no duty on the part of the defendant to separate and take the portion ordered. This his Lordship refused to do; and the defendant then went into evidence.

At the close of the case the defendant required the learned Judge to direct a verdict for him, on the same grounds as those on which he had called for a nonsuit. The learned Judge refused to comply with this requirement of the defendant, and told the jury that under the Statute of Frauds the plaintiff was not entitled to recover unless there was an acceptance of the goods by the defendant; and he left to the jury the question whether Phelan was the agent of the defendant for the purpose of receiving the goods; and, if so, whether there was an acceptance by him of the goods, or such portion of them as he was authorised to order, and did order. He also left to them the question as to the extent of the authority of Phelan, with respect to the quantity of goods to be ordered; and he told them that the plaintiff was not entitled in any event to recover for any greater quantity of goods than Phelan was authorised to order, and did actually order; and he left to the jury on the evidence the question as to the value and prices of the goods which they should be of opinion had been duly ordered, having regard to the evidence of the plaintiff, as to the prices which should be fairly and reasonably charged for the several articles mentioned in the invoice.

The jury found that Phelan was the agent of the defendant; and they brought in a verdict for the plaintiff for £18. 4s. 6d.; and they handed to the learned Judge a list (a copy of which is given above

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at p. 479) which they had made out, showing how their verdict had been arrived at, and specifying the articles for which they considered the plaintiff was entitled to recover, and the prices they allowed him for the same.

M. Morris, in last Hilary Term, having obtained a conditional order that the verdict had for the plaintiff should be set aside, and a new trial granted, on the ground of misdirection, and the reception of illegal evidence—

Sergeant *Armstrong* and *William Anderson* now showed cause. *M. Morris* and *M. Blain*, in support of the conditional order.

Sergeant *Armstrong*.

The defendant called for a direction in his favor at the trial, on two grounds—first, that there was no sufficient acceptance of the goods by the defendant to satisfy the Statute of Frauds; and, secondly, that goods were sent in excess of the order. It is submitted that on neither of these grounds should the plaintiff's verdict be disturbed. The evidence of Phelan was, that he was authorised by the defendant to send to Sheffield what the defendant had authorised him to order; and, on re-examination, he stated that the defendant told him to get the goods as soon as possible from the plaintiff, to see that they were all right, and to forward them to Sheffield. This evidence was sufficient to show that Phelan was the agent of the defendant, and that he had authority not only to receive and forward the goods to Sheffield, but also to approve of and accept them; and, if he had authority to accept the goods, there is no question but that he did so.

As to the other question, whether the defendant was at liberty to reject the whole of the goods, because some articles were sent in excess of the order. The order in this case was a peculiar one; it was not an order for a specific quantity of goods, but for "one copy of each of the large books, and as few as possible of the small forms." *Levy v. Green* (a) and *Cunliffe v. Harrison* (b) will be relied on by the defendant; but in both these cases the order was specific,

(a) 8 Ell. & Bl. 575; S. C., 1 Ell. & Ell. 969.

(b) 6 Exch. 903.

and the nature of the goods was such that it would have been unreasonable to throw on the purchaser the onus of selection. Again, in *Hart v. Mills* (a), the order was specific.—[CHRISTIAN, J. Suppose, in that case, that along with the port and sherry the plaintiff had sent a dozen of claret, could the defendant have rejected the whole?—It is contended he could not. The difficulty of selection is always an element in the decision; and in all the cases to be found in the books the order was specific.—[KEOGH, J. This order appears to be specific in one respect—the nature of the articles to be supplied; and I see by the bill of particulars that a quantity of stationery was sent which was clearly not within the order.]—There was no difficulty in selecting the articles which the defendant ordered from those which were sent in excess.

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M. Morris and M. Blain.

There was no acceptance of the goods by the defendant to satisfy the Statute of Frauds; Phelan's authority as agent was only to receive the goods, and forward them to Sheffield. In *Acebal v. Levy* (b), Tindal, C. J. lays down the criterion of acceptance; at p. 384 he says, "But the criterion to be found in many of the cases, as to acceptance or non-acceptance of goods sold is this,—have the circumstances been such that the defendant has precluded himself from taking any objection to the quality of the goods sold?"—[CHRISTIAN, J. That case has been overruled by *Morton v. Tibbett* (c): the rule now is, that there may be an acceptance to satisfy the statute, and the buyer may still have the right to reject the goods, on the ground that they do not correspond with the contract.]—Assuming that Phelan had authority to select and forward the goods, there is no evidence that he appropriated any portion of them, so as to constitute an acceptance within the statute. *Cunliffe v. Harrison* (d) is a stronger case than the present; there the defendants ordered ten hogsheads of claret, and in pursuance of the order the plaintiff sent fifteen; the defendants thereupon wrote to the plaintiff that

(a) 15 M. & W. 85.

(b) 10 Bing. 376.

(c) 15 Q. B. 428.

(d) *Ubi supra*.

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they had only ordered ten hogsheads, which they would take if they proved satisfactory, and that they would hold the other five on the plaintiff's account. The plaintiff wrote in reply, regretting that any misunderstanding should have arisen, and stating: "You will ascertain in the spring whether you have room for it" (the claret); "and you have seen we are not strigent with old customers as to credit." Several months afterwards, the defendants wrote to the plaintiff, expressing their disapproval of the claret, and refusing to take any part of it. An action was brought for the price of the ten hogsheads, and a verdict found for the plaintiff, on the ground that the defendants had kept the claret an unreasonable time; and liberty was reserved to the defendants to move for a nonsuit. The rule was made absolute to enter the non-suit; and Parke, B., says: "The delivery of fifteen hogsheads, under a contract to deliver ten, is no performance of the contract, for the person to whom they are sent cannot tell which are the ten that are to be his." And again, he says: "I think there was not evidence, either that there was any selection of any particular ten, or that the precise quantity agreed upon was sent." All that was decided in *Hart v. Mills* (a) was, that the defendant having kept some of the wine, was bound to pay for what he kept; but it was never contended that he might not have rejected the whole. If there be any ambiguity in the contract, it is for the party trying to enforce it to show that the excess was within the contemplation of the parties: *Cross v. Eglin* (b).

William Anderson, in reply.

The evidence established that Phelan was the defendant's agent to examine and approve of the goods. "An acceptance by such an agent is as binding as an acceptance by the defendant himself."—*Per Alderson, B., in Norman v. Phillips* (c).

He cited *Co. Lit.* 258 a.

Cur. adv. vult.

May 7.

On this day the Court delivered judgment.

(a) *Ubi supra*.

(b) 2 B. & Ad. 106.

(c) 14 M. & N. 283.

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Two objections were taken to the direction of the learned Judge at the trial of this case. The first was to his refusal to tell the jury that the contract was void under the Statute of Frauds. Upon that point, I have no doubt whatever that the learned Judge was right. It is singular enough, that during the argument here the Counsel at both sides concurred in an incorrect representation of the law on this subject. Both laid it down that the test whether there is an acceptance within the meaning of the statute is, whether the vendee has lost the right of objecting to the quality of the goods. And the defendant's Counsel cited a *dictum* from *Acebal v. Levy* (a), while the plaintiff's Counsel cited a similar *dictum* from *Norman v. Phillips* (b). But both those cases, with many others on the same point, were considered by the Court of Queen's Bench, in *Morton v. Tibbett* (c), which is now the leading case on this subject, and in which the law was settled in direct opposition to both those *dicta*. In that case Lord Campbell, and the full Court of Queen's Bench, laid down the law thus :—"The acceptance, and, "actual receipt of goods, which make a written memorandum "unnecessary, under section 17 of statute 29 Car. 2, c. 3, are not "such an acceptance and receipt as will preclude the purchaser "from questioning the quantity or quality of the goods, or in any "way disputing the fact of the performance of the contract by the "vendor. The effect of such *statutory* acceptance and receipt is "merely to dispense with the necessity of a written memorandum "of the contract." "There may," says Lord Campbell, "be an "acceptance and receipt within the meaning of the Act, without "the buyer having examined the goods, or done anything to "preclude him from contending that they do not correspond with "the contract."

Tomkinson v. Staight (d) is to the same effect. Well, in this case the jury have found that Phelan was the defendant's agent to receive the goods, and that, as such, he accepted them for him ; and even though the defendant be right in his contention that such

(a) 10 Bing. 384.

(b) 14 M. & W. 263.

(c) 15 Q. B. 428.

(d) 17 C. B. 697.

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acceptance did not preclude him from afterwards objecting that the goods were not in accordance with his order, yet, upon the authority of *Morton v. Tibbett*, it was clearly such an acceptance as satisfied the Statute of Frauds. The defendant's first point, therefore, fails.

The second objection raises a question of great peculiarity, and, in my mind, of considerable difficulty. The learned Judge who tried the case took exceeding pains in working out its details, as he always does, and succeeded in procuring a verdict, which in my opinion, whatever be its value in point of law, meets precisely the justice of the case. I cannot but think that a grievous hardship will be inflicted on the plaintiff, if he shall get nothing at all for the labour, the materials, and the time, which he unquestionably expended for the defendant. In obedience to an order given by the defendant's agent, he set up his types, and produced a commodity which if thrown back on his hands will be utterly useless, except as waste paper. The order was entirely uncertain as to quantity. There was no suggestion, nor in my opinion any ground for one, that the plaintiff acted otherwise than *bona fide*, in the way in which he endeavoured to overcome the uncertainty, *i.e.*, by sending a quantity out of which the defendant might select what he wanted. We now know *ex post facto*, by the verdict of the jury, founded on the evidence of the defendant's own agent, but not on any knowledge which the plaintiff possessed, when he was executing the order, what the quantity was which answered to the terms of the order; that is, the jury have reduced to certainty what down to their verdict was, so far as the plaintiff knew, in utter uncertainty. The quantity thus ascertained was considerably less than the quantity sent, and some trifling articles were sent which were not of the kind ordered at all. I confess, it appears to me that, whatever the law may be, the justice of the case was that the defendant should have applied the standard which he alone possessed for defining the quantity which fell within the sense of his order, should retain and pay for that, and send back all the rest. The risk or inconvenience which this rev. gentleman would have run, in so acting, were infinitesimal, and the plaintiff would be sufficiently punished for his mistake of excess, by the loss of the

surplus articles, which, when refused by the defendant, would be utterly worthless. The verdict is therefore obviously a just one; but of course, if the law be against it, it must fail.

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The point of law on which the defendant now resists payment for anything, is this:—The verdict having ascertained the true measure of the order, as regards quantity, the case is (he says) the same as if that precise quantity had originally been ordered. The articles sent were greatly in excess in quantity, and to a small extent varied in kind. Therefore, the case is ruled by *Levy v. Green (a)*, and the previous cases therein referred to.

When a Court is called upon to submit to an authority, and, so doing, to refuse remuneration for goods and labour supplied, there are two points which it ought very carefully to investigate. First, what is the rule of law which the authority prescribes; second, does the case at argument fall within the letter or the spirit of the rule. Now, it is to be remarked at the outset that the class of cases in question profess not to lay down any general rule at all. Lord Campbell says, in *Levy v. Green*, p. 580: "I do not lay down any general rule of law, that wherever more is sent than is ordered, the purchaser may reject what was ordered." In the Exchequer Chamber, Willis, J., says: "Adopting the view taken by Lord Campbell, and not laying down any general rule, I think," &c. And Byles, J., says: "I do not say that in all cases where the goods ordered are sent, together with others not ordered, the vendee would have a right to refuse to accept any."

Therefore, the case lays down no general rule, but each case as it arises must be dealt with according to the terms of the particular contract, and the act done in assumed performance of it. If then the cases lay down no general rule, what principle do they proceed on, as applied to their own particular facts? Simply this, a vendor shall not be allowed to force on a vendee a contract different from the one he entered into. There was one cardinal fact common to all those cases, the very corner-stone of decision, the order was specific as to quantity as well as to kind. And the decisions amount simply to this, that when such an order is given, the

(a) 8 EL. & BL. 575; S. C., 1 EL. & EL. 989.

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vendee's contract is to accept the very thing specified, and nothing else; and if the vendor sends him a greater quantity, still more if he sends him a lesser quantity, mixed up with other things, the vendee has a right to say *non hæc in fœdera veni*, and may reject the whole.

That then is the principle of the cases, which a very slight reference to them will make manifest. In *Cunliffe v. Harrison* (a), Baron Parke says, "They had a right to have ten specific hog-heads delivered to them. The delivery of fifteen hog-heads, under a contract to deliver ten, is no performance of that contract; for the person to whom they are sent cannot tell which are the ten that are to be his; and it is no answer to the objection to say that he may choose which ten he likes, *for that would be to force a new contract on him.*" But the leading case now is *Levy v. Green*. In that case the order was precise, both as to the subjects and quantities. What the plaintiff did, by way of executing it, was to send a crate containing smaller quantities of the things ordered, mixed up with other articles which had not been ordered at all. The Court of Queen's Bench was equally divided. The Court of Exchequer Chamber was unanimous in giving judgment for the defendant. The Judges there referred with approval to Lord Campbell's judgment in the Court below; and that is the judgment which appears to me to put the case upon its true grounds, and in which, if I may venture to say so, I entirely concur. He says: "*Particular quantities and kinds of goods were ordered to be sent by railway, with a caution not to send more.* A crate arrives at the station, containing the goods ordered, and also several other kinds of goods not ordered. The whole are in one package; and they are accompanied by one invoice, making one charge for the whole of the goods in that crate. It seems to me that *this was not a performance of the contract of the plaintiff's*; for I think that their contract as vendors was to supply the goods in such a manner that the purchaser might receive them, and apply them to his own use, without incurring trouble, risk, or expense *beyond what by the contract he was to incur.*" The passages which I have emphasised contain the point of the decision.

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Such then are the cases by which it is said that the present is ruled. The cardinal fact in all of them was original preciseness in the order, and that fact was the expressed basis of the decisions. That fact is confessedly wanting in this case. The order here was utterly uncertain in its terms, it referred for ascertainment to something extrinsic; that ascertainment has since been made by the jury, and the question now to be considered is, whether that *ex post facto* certainty is equivalent, within the reason of those cases, to an original certainty in the terms of the order.

In my opinion there are two cardinal distinctions between the present case and those which have been cited, which exclude their application. First (which was the one relied on in argument), the order here was not specific; second (which was not dwelt on in argument, but is the one which has decided my judgment), the order referred, for ascertainment, to a certain measure or standard, which measure or standard was a thing that lay in the knowledge of the defendant, but of which the plaintiff was ignorant. If this be so, it follows that, when the plaintiff forwarded to the defendant a stock out of which, by application of the standard in his own possession, to select the quantity which would fall within the order, so far from trying to force on him a contract different from the one he had entered into, he acted in precise accordance with the spirit of that contract. Now, to show that the contract was what I have stated, I turn to the evidence. The defendant was a Roman-catholic clergyman residing at Sheffield; he was a member of the committee of a new cemetery about to be opened there; he had an agent or correspondent in Dublin, a Mr. Patrick Phelan, who was superintendent of the Glasnevin cemetery here. Certain books with printed headings, and certain printed forms, were in use in the Glasnevin cemetery. They had been supplied by Mr. Shannon, the plaintiff. Shortly before the intended time of opening the Sheffield cemetery, Mr. Phelan was over in Sheffield; he brought with him some of the Glasnevin forms, and showed them to the defendant. The defendant was pleased with them, and wished to have them adopted in the new cemetery at Sheffield; and he authorised Phelan to give the plaintiff an order. The defendant was soon after himself in

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Now, what were the terms of the order? According to the evidence of the defendant's agent Phelan, they were these—"one copy of each of the *large* books, and *as few as possible*" of the other articles. The plaintiff's own evidence was somewhat different—"one book of *the forms least in use*, and a moderate quantity of "the others, *in proportion* as they were used in Glasnevin cemetery." Now, what is the meaning of that? Obviously that which was put upon it at the trial, and in support of which the evidence of Phelan was given, which was objected to by defendant's Counsel, but, in my opinion, properly received, namely, that the words "as few as possible," or "a moderate quantity in proportion," whichever were the words, meant this—as few as were consistent with the defendant's object of establishing in Sheffield the system which was in use in Glasnevin. Now, how was that to be ascertained? What were the elements which composed that standard? The size of the Sheffield cemetery; the population of Sheffield; the average mortality of Sheffield; the number of other cemeteries existing in Sheffield—in a word, the whole mortuary statistics of Sheffield. But these were matters all lying within the knowledge of the defendant, but of which the plaintiff cannot be presumed to have had any knowledge whatever. The defendant did not think fit to estimate those matters before he gave his order; preferring probably to postpone the calculation until he should have all the forms before him. But, be the reason what it may, certain it is that the order was communicated to the plaintiff in the general terms I have stated. What was the plaintiff to do? He knew nothing of Sheffield or its burial requirements. It may be said he might have asked for further particulars; but the contract did not put it on him to do so. The question is, what was he bound to do by the terms of the order he had received? The defendant had chosen to leave it vague; and in all probability, if asked for a specification of the quantities, would have answered, he could not determine that until the books and forms were all before him. What was a man to do who had received such an order? In my opinion, what he did, viz,

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to send a sufficient stock to enable the defendant, by application of the standard which he alone possessed, to define the quantities which fell within his order. The nature of the order in this case justified him in doing the very thing which the law forbids him to do when the order is specific. Coleridge, J., in *Levy v. Green*, thus explains the cases in 15 *M. & W.* and 6 *Exch.*:—

“The cases in the Exchequer seem to proceed on the very sound doctrine that, when the goods are undistinguishable, it is an attempt to substitute *for a sale of specific goods an offer to permit the purchaser to supply himself out of a stock of such goods, which is a contract of a different nature.*” But the contract here is in fact a contract of that very nature last referred to by Mr. Justice Coleridge, and therefore justified the seller in sending the purchaser a stock out of which to supply himself. This is the consideration which renders it impossible to say that the *ex post facto* ascertainment by the jury of the quantities covered by the general terms of the order is equivalent, for the purposes of the doctrine in question, to an original preciseness in the terms themselves of the order. How were the quantities ultimately ascertained by the jury? Not by the application of any measure which lay in the plaintiff’s knowledge, but by the enforced evidence under subpoena of the defendant’s own agent Phelan. In *Levy v. Green*, and in the previous cases in the Exchequer, sending a quantity larger than or different from the specific terms of the order was, as Baron Parke says, an attempt to force a different contract on the purchaser. But, in this case, sending a stock for selection, according to a measure known only to the purchaser or his agent, was not obtruding a different contract, but putting the existing contract in a course of performance in the only way the seller could have possibly performed it. Everything in these cases depends on the terms of the contract which the purchaser has entered into; but the contract here differs from the contracts in all the cases cited, just in the particular which formed the expressed ground and basis of the decisions in those cases. I cannot therefore concur in the opinion that, if the only excess in delivery which the plaintiff had com-

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mitted was sending a larger stock of the things ordered than was afterwards found by the jury, on the evidence of the defendant's agent, to be what was meant by the order, that this case would be ruled by *Levy v. Green*, or the other cases. I think it would not; and that, if that were all, the plaintiff would be entitled to hold his verdict.

It was argued that difficulty or inconvenience would be imposed on the defendant, if this mode of performing the contract were allowed—for instance, he could not know for what amount of money to plead payment into Court. But, if the nature of the contract be what I have stated, it is obvious that the argument is entitled to no weight. The difficulty is one of the natural incidents of the contract. The defendant is simply in the position in which every defendant is when the plaintiff's claim is an unliquidated one: he must estimate its amount at his peril. The difficulty is here the less, because the measure was one which lay in the defendant's own knowledge. But then it was said, how could he do this, when the Judge allowed the prices in the invoice to be departed from? I confess I think the case was a little over-elaborated in this particular, and that it would have been better to have held the plaintiff to the prices in the invoice. But nevertheless I think the Judge was logically right. The plaintiff did not know but that all the articles would be kept; and he priced them on that assumption. But, when a large quantity was rejected, higher rates on the remainder were necessary to compensate for the setting up and working the types, the expense and labour of which was the same for a small quantity as for a large. That was the plaintiff's evidence, which was I think properly received; and, if it was, why this also was one of the natural incidents of the contract which the defendant should at his peril take notice of when paying money into Court. Once arrive at the conclusion that the contract was what I have stated, and difficulties of this kind are no obstacle to its execution.

But it was said, as to one item, the order was specific as to quantity. A greater quantity of that item was sent; and so the case is brought expressly within the two cases in the Exchequer. The order

was, according to Phelan, for "one copy of each of the *large* books;" according to the plaintiff, for "one book of the forms *least in use*." Now, it appears on the invoice that, as to four different species of books, one copy only of each was sent; but, as to two other species of books, two copies of each were sent—two registers, and two workmen's account-books; and, if it had been proved that these registers and workmen's account-books fell under the class which Phelan calls "large books," and the plaintiff "books least in use," why there would then be a case of excess in those two items over the quantity specifically ordered. But there was no proof or evidence whatever of that kind. For aught that appears, these two classes of books may have been amongst those most in use; and therefore not amongst those as to which quantity was specified, but amongst those to which the general order, "as few as possible," &c., applied. The evidence does not therefore supply the defendant with the means of founding any special argument upon the instance of these two particular items.

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But there still remains a difficulty, which is undoubtedly the most formidable in the case. I have been much embarrassed by it; and I am bound to say that it is with no small distrust in the soundness of my own conclusion that I have ventured to overcome it. Though the order was uncertain as to quantities, it was perfectly definite as to kind—books and forms. The plaintiff unluckily put into his parcel some £5 or £6 worth of stationery or the like, clearly out of the order. Supposing him right in all other respects, must he lose all for this mistake? No case has yet decided that, when the seller sends the exact articles ordered, but sends along with them other articles altogether *generis alterius*, that the purchaser is, for that reason, entitled to reject the whole. In *Green v. Levy*, a smaller quantity of the article ordered than had been ordered was sent, which was alone sufficient to support the decision. In the Queen's Bench, Mr. Justice Coleridge said:—"I think that the mere addition of distinguishable articles to an order does not entitle the purchaser to reject the goods ordered." And in the Exchequer Chamber, Willes, J., said:—"It may be, no doubt, that there are some cases in which an addition of other articles to

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"the goods ordered might make no substantial difference." And Byles, J., said:—"I do not say that in all cases when the goods ordered are sent, together with others not ordered, the vendee would have a right to refuse to accept any." Now, I concur in that observation of Mr. Justice Coleridge. I think if the order be in other respects correctly executed in accordance with the contract, the addition of things of a totally different kind does not invalidate the whole. Still, I cannot shut my eyes to the fact that most of the Judges in the Exchequer Chamber laid at least as much stress on the fact that articles different in kind had been sent, as that there was a deficiency in the quantity of the commodity actually ordered, though that latter circumstance is alone sufficient to warrant the decision. Seeing, however, that there has as yet been no decision on this particular point—seeing that those cases disclaim the notion of laying down any general rule at all, and fortified by the opinion of Mr. Justice Coleridge, and, to a certain extent, by those of Mr. Justice Willes and Mr. Justice Byles, I do not feel myself coerced to set aside a verdict, which I believe to be a just one, merely because the plaintiff might in all other respects, as for the reasons I have stated I believe he has, put these few articles of stationery into his parcel. And there is the less reason so to hold in the present case, because, inasmuch as by the nature of the contract, as I construe it, there was in all events to be a process of selection and rejection to be performed by the defendant. No extra inconvenience or difficulty would be caused to him by throwing in the stationery among the other rejected articles.

Justice, in my opinion, required that the defendant should pay for the articles which the jury have found were covered by his order, which he might himself have selected when he received the parcel, but which the plaintiff had no means of determining when he made up the parcel; whilst the defendant, on the other hand, should be obliged to take back, and be at the loss of all that was in excess. That is what the verdict has done. The law is not, in my opinion, opposed to it.

I think the verdict should stand; and I regret that the order of the Court will be otherwise.

MONAHAN, C. J., delivered the judgment of the other Members of the Court:—

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This case comes before the Court on a motion to set aside the verdict, and for a new trial, on the ground of misdirection. The summons and plaint was in the common form for goods bargained and sold, goods sold and delivered, and on an account stated. The defences were simply traverses of the causes of action contained in the several paragraphs of the plaint; and the issues were in the terms of the defences.

The case was tried in the Consolidated Nisi Prius Court, before Mr. Justice O'Brien, during last Michaelmas Term. It appears that the plaintiff was a stationer residing in Dublin, and that the defendant was the person who had the principal management of a cemetery at Sheffield. In the month of August last, the defendant requested Mr. Phelan (who had the management of the cemetery at Glasnevin) to procure for him certain books and forms similar to those used in the Glasnevin cemetery, and which were intended to be used in the cemetery at Sheffield; and Mr. Phelan thereupon gave a verbal order to the plaintiff, who was in the habit of supplying articles of that description to the cemetery at Glasnevin, to make up the books and forms required by the defendant; and on this part of the case the evidence of Mr. Phelan is material. He was examined on behalf of the plaintiff, and stated that he ordered from the plaintiff "one copy of each of the large books," viz., certain large books of forms to be used in this intended cemetery, "and as few as possible of the small forms;" that he told the plaintiff to send the books and forms so ordered to him; and he said that the defendant did not tell him to examine the goods. The goods were accordingly sent to him by the plaintiff. On cross-examination he stated that he gave no other order to the plaintiff than for one copy of each of the large books, and as few as possible of the small books and forms; that he had no authority from the defendant to order more; that he ordered no stationery, and that he had authority to send to Sheffield what the defendant had authorised him to order. On further cross-examination he stated that he ordered

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from the plaintiff one of each of the articles mentioned in six items of the invoice, from No. 2 to No. 7 inclusive; that the articles mentioned in the fourteen other items of the invoice, from No. 8 to No. 21 inclusive, were necessary in a cemetery, and were used in Glasnevin. He then stated that, when he got the goods and the invoice, he thought there were too many of some of the articles; but that he made no communication to the plaintiff on the subject, but sent forward the goods to the defendant at Sheffield. The next witness was Shannon, the plaintiff. I need not go through his evidence; he seems to have given a different account of the order from Phelan; but the only matter that may be material is, that in the latter part of his evidence he states that he would not swear that Phelan ordered any stationery. At this stage of the case there was some misunderstanding as to what Phelan had stated on cross-examination: he was recalled, and on re-examination stated that the defendant told him to get the goods from the plaintiff as soon as possible, and to see that they were all right, and to send them over to him. The defendant was then examined; and, like the plaintiff, he gave a somewhat different account from Phelan, as to his authority to Phelan. This is not now material, as the jury have found what goods were in fact ordered. Immediately on the arrival of the goods at Sheffield, the defendant refused to accept them, and left them at the railway station for the plaintiff's use, and so wrote to the plaintiff.

At the close of the case, the Counsel for the defendant required the learned Judge to direct a verdict for the defendant, on the grounds, first, that there was no sufficient acceptance of the goods by the defendant to satisfy the Statute of Frauds; and, secondly, that as the plaintiff had admittedly sent more goods than were ordered, or Mr. Phelan had authority to accept, the defendant was entitled to avail himself of the objection, and that he was not bound to set aside or return the goods sent in excess, and to take the portion ordered; but that he was at liberty to reject the entire as he did. The learned Judge refused so to rule, but left to the jury the question, whether Mr. Phelan was authorised by the defendant to accept the goods ordered by him, and if so, whether he had

accepted them, and that if he had, they should find for the plaintiff, for the value of the goods so ordered, and not merely at the prices charged in the invoice and bill of particulars, which was in fact a copy thereof. The reason of this latter direction was, that the plaintiff, in his evidence, stated that if he was to have supplied a smaller portion of the forms than what he forwarded, the prices would have been much higher than in proportion with the prices charged for the larger quantities in the invoice. Under this direction the jury found a verdict for the plaintiff of £18. 4s. 6d. instead of £33. 7s. 2d., the sum claimed by the plaintiff; and they annexed to the finding a list showing the component items of the sum of £18. 4s. 6d. On comparison of this list with the invoice, it will be found that several items of stationery, and some other matters, were altogether rejected by the jury, as not having been at all ordered by the defendant or Mr. Phelan. In several other instances, the quantities charged for by the jury did not amount to more than one-half the quantities forwarded to Sheffield, and of course included in the invoice and bill of particulars, and for these the jury allowed higher prices than claimed in the invoice with respect to this latter class. It may be stated, that in some instances the excess was palpable; one only of some books of a particular description having been ordered, while in some instances two or more were sent, while in other instances the excess may have resulted from the vagueness or generality of the order given, namely, "as few as possible." The question therefore is whether, under such circumstances, the present verdict can stand. I need scarcely say that, sitting here in this Court, we have no power to overrule well-considered cases, decided by a Court of co-ordinate jurisdiction, much less the decision of the Court of Error, here or in Westminster. The good sense of this rule is obvious; if in such cases each Court was at liberty to act on its own notion of what the law ought to be, the result would be that the law would be in that state of uncertainty that no Counsel would be able to advise his client as to his rights or liabilities. This being so, I may now state that, in the opinion of the majority of the Court, namely, my Brothers BALL, and KEOGH, and myself, this case is concluded by

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authority, and cannot, in our opinion, on any intelligible grounds, be distinguished from the case of *Levy v. Green* (a), and the same case on appeal (b): and I may here state that the attention of Mr. Justice O'Brien was not called to this case at the trial; and I am at liberty to say this much, that if it had been, his ruling would have been different. The facts of that case were these:—the action was for goods sold and delivered, and the plaintiff claimed the price of the entire goods sent, which consisted altogether of eight or nine items of delft, forwarded by a manufacturer, in pursuance of an order given by the defendant to the plaintiff's agent. Of these items, the first five or six were quite correct; with respect to one item, a smaller quantity had been sent than ordered, namely, three sets of dishes instead of six. These several items amounted to five or six pounds. In addition to those items so ordered, other things, amounting in value to some twenty-five or twenty-six shillings, not ordered, were sent. At the trial, before the Sheriff of Bristol, the case was defended principally on the ground that the goods had not been sent within a reasonable time, and therefore that the defendant was justified in rejecting them; but on the new trial motion in the Court of Queen's Bench, the objection taken was that goods not ordered having been included with those ordered, defendant was entitled to reject the entire. At the trial, some evidence had been given, in order to establish a custom of the trade, that when a crate of such goods were ordered, and when the goods ordered did not fill the crate, it was usual to send others sufficient for that purpose, on an implied understanding that if the customer did not approve of them he was to be at liberty to return them; but, as I collect, the opinion of the jury as to the existence of any such custom was not taken; but the Sheriff acted on that view of the case, and a verdict was found for the plaintiff, for the price of the goods actually ordered, excluding of course those not ordered. I do not think it necessary to refer to the arguments of Counsel, but, as there was a difference of opinion amongst the Judges, it is necessary to see exactly what the grounds of that difference were. Lord Campbell, C. J., was decidedly of opinion

(a) 8 El. & Bl. 375.

(b) 1 El. & El. 969.

that the defendant was not liable; that the plaintiff, having sent in one parcel, goods not ordered, with those which were ordered, including all in one invoice, had no right to impose on the defendant the trouble of separating the part ordered from that not ordered; and by accepting part, to run the risk of having been taken to have accepted all. He suggests that cases might occur in which vendors might, in terms, send with the goods ordered samples of other goods, the receipt of which would not cast on the purchaser either risk or trouble, but that in the case before them such circumstances did not occur. Mr. Justice Wightman's judgment I do not think it necessary to refer to, as he virtually concurs in the view taken by Lord Campbell: but it is necessary to refer particularly to the judgment of Mr. Justice Erle, as he and Mr. Justice Coleridge differed from Lord Campbell and Mr. Justice Wightman. He, after stating the facts of the case says:—"The facts seem to be, "that there being space in the crate, the extra articles were put "in by way of dunnage, as it were;" and he considers the case as if the accompanying letter or invoice had in fact stated,—we take the liberty of sending some articles which you may keep or return as you please; and he, in fact, considered that such was the effect of what had been done, and that the rejection by the defendant was not at all on the ground of the excess in the goods sent, which he considered as a mere afterthought on the part of the defendant's advisers. The Judges of the Queen's Bench being thus equally divided, the case was brought, as was to be expected, to the Court of Appeal, where the judgment of the Queen's Bench, which was in accordance with the opinions of the Chief Justice and Mr. Justice Wightman, was unanimously affirmed. The several Judges gave their reasons at length, which I do not think it necessary to refer to in detail, the substance being, that the goods not ordered, having been sent in one parcel and in one invoice with the goods ordered, they could not properly have been considered as goods sent on sale and return; and that the defendant was not bound to incur the risk of accepting all, by in fact accepting the parts ordered by him. Now, to apply not merely the facts, but also the reasoning of all the Judges in that case to the facts in

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the present case, it occurs to me that there are no possible grounds for concluding that in the present case any portion of the goods were sent as it were on approbation, or sale and return; they are all included in the one package, without any reason for it, such as suggested by way of dunnage in the case in England; they are included in one invoice, and the action is brought for the entire amount, and the invoices are at prices or rates quite different from what they would have been if only a portion of the goods were to be retained. There is not in the present case any pretence for an alleged usage of trade; the defendant is not a trader at all, and, therefore, it occurs to me as idle to suggest that the plaintiff intended to send any portion of the goods on sale or return, or that the defendant could or ought to have thought so. Be it recollected that several items rejected by the jury consisted of books and forms specially printed and forwarded for the Sheffield cemetery. How can it be supposed these articles were sent on sale or return? But it has been argued by the plaintiff's Counsel that the order given by the plaintiff was vague and uncertain, and therefore not within the general rule. Surely this argument cannot apply to several portions of the goods sent, and rejected by the jury; for instance, with respect to the five or six pounds' worth of stationery, and steel pens and pencils, not ordered at all; nor can it apply to those items in which, for instance, only one book of a particular kind was ordered, and two or more sent. If this argument were to apply at all, it could only be to those items in which no particular quantity was ordered, and the jury held that an excessive and unreasonable quantity had been sent. But even with respect to such a case, if a tradesman accepts a general order, such as I have stated, what principle or authority is there for the proposition that he can exceed it in an unreasonable manner, and throw on the defendant the difficulty and risk of determining at his peril what is a reasonable quantity, and accepting so much, and rejecting the remainder. I am not aware of any principle or authority in favor of such a proposition. I see no hardship in a tradesman, before he executes such an order, being obliged to apply to his customer and obtaining greater particularity as to the order,

or, should he omit to do so, being obliged at his peril to send only a reasonable quantity; or, if not, to inform his customer that he is obliged to take only what he may require. But that the tradesman is to be at liberty to execute such an order as he pleases, and then hold the customer responsible for what the jury may consider a reasonable quantity, I do not understand. I can quite understand, that if an order is vague, a jury may be justified in not holding a very tight hand as to what may be considered a fair compliance with such an order; but where, as in the present case, even if it were confined to those items, the jury have found that more than double a reasonable quantity has been sent, I cannot find any grounds to satisfy me that the defendant in such a case is at all liable for any portion of the goods so sent. I need not say, that even if the plaintiff's argument were well founded on this part of the case, it would avail him nothing; as, if the majority of the Court are right in the view they take of *Levy v. Greene*, the stationery and other articles not ordered, and the instance in which one book of forms was ordered, and more than one sent, would of themselves be decisive of the case.

In conclusion, therefore, I can only say, that, having regard to the facts in the case of *Levy v. Green*, and the principle decided in that case, we are utterly unable to distinguish it from the present, or to uphold the verdict obtained by the plaintiff, and must, therefore, make absolute the conditional order for a new trial.

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Common Pleas
SHANNON
v.
BARLOW.

E. T. 1864.
Common Pleas

M'ENALLY and others v. WETHERALL and others.

April 26, 27.

A will contained a devise in these terms:—"I leave to my brother M. M. my estate T., and the residue of all I possess; and, in case he has no heir, at the demise of said M. M., my estate and freehold to be given to the first heir-at-law." M. M. died without issue, but leaving a widow, who continued in possession till the bringing of the ejectment by the nephew and heir-at-law of both brothers. The widow claiming under a devise to her for life by M. M., who had executed a disentailing deed, under the supposition that he was tenant in tail.—*Held*, that the devise to the first heir-at-law was an executory devise over a limitation in fee, and not a remainder over after an estate tail.

THIS was an ejectment on the title, brought by the plaintiffs, to recover the lands of Tullyharmon, in the county of Monaghan, and mesne rates from the 3rd of November 1851. The defendants John Gubbins and Eleanor Smith took the ordinary statutable defence. At the trial before Fitzgerald, J., at the Monaghan Spring Assizes, 1864, it appeared that a person named John M'Enally had been the owner in fee-simple of the lands in question, and that, by his will dated the 9th of June 1837, he devised the estate in the following terms:—"I leave to my brother Michael M'Enally my estate of Tullyharmon, and the residue of all I possess; and, in case he has no heir, at the demise of said Michael M'Enally, my estate and freehold to be given to the first heir-at-law." The testator afterwards died, and his brother Michael entered into possession, and died several years since, leaving no children, but only a widow, the defendant Eleanor Smith. The plaintiff was the nephew and heir-at-law of both brothers; and he claimed the estate under the limitation in his uncle's will.

At the close of the plaintiff's case, Counsel on behalf of the defendants called on the learned Judge to nonsuit the plaintiff, or direct a verdict for the defendants, on the ground that, even if the Counsel for the plaintiffs were correct in their construction of the will, in such case the widow of Michael would be entitled to dower, and that she was, at the time of the bringing of the ejectment, in lawful possession of the one undivided third of the lands in dispute, and that her possession, which was lawful, and had been acquiesced in, could not be determined without a demand of possession. The learned Judge having declined to nonsuit, or direct a verdict for defendants, evidence was given, on the

Held also, that the widow's claim to dower out of the lands did not, in the absence of an assignment of dower, give the widow an immediate estate in the lands; and that an ejectment was maintainable without a demand of possession.

part of the defendants, that the defendant Eleanor was the widow of Michael, and that at his death in 1851 she came into possession of the lands, and so had since continued, by herself and persons claiming under her; that Michael, claiming to be tenant in tail under the above devise, executed a disentailing deed in 1839, and that by his will he devised the lands in question to the defendant Eleanor for her life, and at her decease to whoever would then be his (Michael's) heir. It was contended that Michael took an estate tail under the will of John, and had acquired the fee-simple under the operation of the disentailing deed, and that under his will the defendant Eleanor was entitled to an estate for her life. At the close of the case on both sides, and both parties agreeing that there was no question of fact in controversy for the determination of the jury, and as to the amount of mesne rates, the learned Judge directed a verdict for the defendants, and requested the jury to ascertain the amount thereof. His Lordship reserved leave for the plaintiff to move the Court to set aside the verdict, and enter a verdict for the plaintiff for the whole or such portion of the lands in question as to the Court should seem proper, if, on the construction of the will of said testator John, the Court should be of opinion that the plaintiffs were entitled to maintain the action, either as to the whole or a part of the lands; also to enter a verdict for the plaintiff for mesne rates. His Lordship expressed no opinion as to the construction of the will; but, for the sake of convenience, he directed a verdict for the defendants. A conditional order having been obtained to change the verdict for the defendants into one for the plaintiffs, pursuant to leave reserved, cause was now shown on behalf of the defendants by—

E. T. 1864.
Common Pleas
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 WETTERALL

H. Law, with whom was Beytagh.

A demand of possession was necessary, inasmuch as the widow was in undisturbed possession for nearly fourteen years, and her claim for dower attached. The assignment of dower by the heir required no livery, simply assent; and, at all events, she had such an equitable title as required a demand of possession: *Doe v.*

E. T. 1864. *Russell* (a); *Winterscale v. Newcomen* (b). Secondly; the words of the will give an estate tail to Michael, and the remainder over was therefore barred by the disentailing deed. The words "in case he has no heir" mean an heir of his body. *Doe v. Frost* (c) will be relied on at the other side, but is clearly distinguishable. The words were, "and if the said W. Frost should have no children, child, or issue, the said estate is, on the decease of the said W. Frost, to become the property of the heir-at-law." *Wyld v. Lewis* (d); *Peyton v. Lambert* (e); *Thorpe v. Thorpe* (f); *Jones v. Ryan* (g).

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Harrison and Adair.

The demand of possession was not necessary, in order to determine the plaintiff's right of possession. She had no estate, as dower had not been assigned: *Park on Dower*, p. 283; *Co. Lit.* 34 b, 37 a; *Doe d. Thomas v. Roberts* (h); *Cole on Ejectment*, p. 59. With regard to the other point; the limitation over to the heir was an executory devise, after an estate in fee-simple, and could not be barred by a disentailing deed. In *Parker v. Birks* (i) a testator devised to his brother, H. W., his heirs and assigns for ever, two-thirds of his real estate, and to his nephew, W. S., the remaining one-third of his real estate, and to his heirs and assigns for ever; but in case W. S. should die without child or children of his body, lawfully begotten, he devised to the children of W. S., their heirs and assigns for ever, on the decease of the aforesaid W. S., the part of his said real estate devised to said W. S. It was held to confer an estate in fee-simple upon W. S., subject to be defeated by an executory devise, if at his decease there should be no issue of W. S. living. So in *Ex parte Davies* (k), the devise was of residuary, real and personal estate, to A, his heirs, executors, administrators and assigns, provided that if A should die without leaving any

(a) 4 Ir. Law Rep. 170.

(c) 3 B. & Ald. 546.

(e) 8 Ir. Com. Law Rep. 485, 489.

(g) 9 Ir. Eq. Rep. 249.

(i) 2 Sim., N. S., 114.

(b) 1 Jones, 496.

(d) 1 Atk. 432.

(f) 1 H. & C. 326.

(h) 16 M. & W. 778.

(k) 1 K. & J. 136.

lawful issue of his body, the real estate should at his death be divided into two equal parts, and the testator gave one half to B, his heirs and assigns, and the other to C, his heirs and assigns, B having it in his power to provide for the children of his two sisters. Vice-Chancellor Lord Cranworth held that there was a gift in fee to A, with an executory devise, to take effect on his death, if he left no issue. The words in *Wyld v. Lewis* only gave an estate for life, unless an estate tail be implied. Here the words are sufficient to give to the first taker an estate in fee-simple. *Jones v. Ryan* is easily distinguishable, as the gift over was not referable to the period of the death of the first taker. They also cited *Stratfield v. Powell* (a); 2 *Jarman on Wills*, p. 492; *Hawkins on Wills*, pp. 206, 207; *Tudor's Leading Cases*, p. 552.

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Beytagh, in reply, on the first part cited *O'Brien v. Bernard* (b), and on the second he cited *Lewis on Perpetuities*, p. 311.

Cur. adv. vult.

MONAHAN, C. J.

We are satisfied that this case cannot be distinguished from the case of *Parker v. Birks* (c), and the other case of *Ex parte Davies* (d), relied on by the plaintiffs, and we must therefore set aside the nonsuit, and give judgment for the plaintiffs.

April 27.

(a) 1 B. & B. 1.

(b) 6 Ir. Law Rep. 6.

(c) 1 K. & J. 136.

(d) 2 Sim. N. S., 114.

E. T. 1864.
Common Pleas

STUBBER and others v. ROE and others.

April 21.

A tenant in common has no right to use the name of his co-tenant in common as a co-plaintiff in an action of ejectment for non-payment of rent without his consent; and the Court will, on motion at the instance of the party whose name is employed, direct the name to be struck out, and the plaintiff's attorney to pay the costs.

J. E. WALSH (with whom was *J. P. Hamilton*) moved, on behalf of Parnell Robert Maillard, in the plaint called *Parnell v. Maillard*, who had been named as a party plaintiff in the writ of summons and plaint in ejectment in this cause, that the name of said Parnell Robert Maillard be struck out of said writ, he never having authorised such proceeding, nor consented that his name should be made use of as such plaintiff, or otherwise; and that Nicholas Stubber and Catherine Winter, the parties named as co-plaintiffs in said writ, or Richard Wilkinson, who now appeared in said writ as attorney for the plaintiffs, do pay the costs of the motion. It appeared, by the affidavit filed in support of the motion, that the name of Maillard had been used as a co-plaintiff in this and several other actions of ejectment for non-payment of rent, without his knowledge, sanction or consent. He also denied his having assented to the use of his name in any former proceedings, at the suit of the other co-plaintiffs, relating to the same property.

Sergeant *Armstrong* and *Buchanan*, contra, contended that, as Maillard was admittedly a co-devisee of the lands in question under the will of the Rev. Sewell Stubber, the co-plaintiffs were entitled to use his name along with theirs in the ejectment proceedings. The plaintiff's attorney had acted on the *bona fide* assumption that he had the consent of Maillard to use his name.

MONAHAN, C. J.

In this case, and in two others, an application has been made to the Court by a party joined as a co-plaintiff in an ejectment for non-payment of rent, to strike out his name, on the ground

of the same having been so used without his authority, and contrary to his wish. No question has been raised here as to the fact of these motions having been brought forward in time; and the only question in the case is, whether the other plaintiffs had a right to use the name of the dissentient co-plaintiff. The alleged title of the co-plaintiffs appears to have accrued under a will made several years ago, under which the property vested in several co-devisees, of whom four are now surviving. Whether the present co-plaintiffs are in fact entitled to maintain this ejectment is a question with which we have nothing to do. We must take it for granted that the ejectment has been brought by three of the plaintiffs, with the *bona fide* intention of recovering their proportion of the rents, by the eviction of the tenancy. But their co-devisee, whom they have joined in the action, says, "I will not be a co-plaintiff along with you; and you have no right to coerce me to go to law, to recover property which I do not claim, and which, even if entitled to, I do not choose to go to law for." It is then suggested that the latter is in collusion with the defendant. This he denies; but he further says that, whether he is or not, the other plaintiffs have no right to use his name against his will. Plaintiffs' Counsel have not been able to furnish us with any cases in which the Court have compelled parties to allow the use of their names, unless where they have been trustees for the others. It is one of the incidents of the character of a trustee, that a Court of Law will interfere, and coerce him to allow his name to be used. But that applies only to the case of an actual trustee; for, in *Montgomery v. Montgomery (a)*, where a trust had legally devolved upon an individual, by a renewal having been taken in his name, but who did not however choose further to assume the burden of the trusteeship, the Court held that it had no authority to force him to sue, or, what was equivalent to it, to allow his name to be used as a co-plaintiff. We do not think that we have power to do so here. The co-tenant is not in any point of view a trustee; nor have we a right to control his conduct, as if he filled that

E. T. 1864.

Common Pleas

STUBBER

v.

ROE.

(a) 6 Ir. Com. Law Rep. 529.

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ROE.

character. No doubt the other plaintiffs may be placed in great difficulty in the maintaining of an ejectment for non-payment of rent by three out of four co-lessors; but that consideration cannot influence our judgment. If three of four co-owners were to bring an ejectment on the title, they might recover *pro tanto*. Without saying what might be the effect of bringing an ejectment for non-payment of rent in this way, all that we at present decide is, that we have no power to force the party who has brought forward this motion to be a co-plaintiff; he being neither expressly a trustee, nor placed in a situation involving a trust. The motion must therefore be granted; and, as the plaintiff's attorney has used his name without authority, he must indemnify this party, by paying the costs of this motion. An attorney has no right to use the name of another upon the instructions of his own client, unless he be satisfied that he had authority so to do.

M. T. 1864.
Nov. 2, 22.

DAWSON v. COLEMAN.

The plaintiff, in an action of contract, who was an officer of the Court of Chancery, resided for the greater part of the year in the county of Dublin, but also had a house within the East Riding of the county of Cork, where also defendant resided permanently, and the cause of action arose. The plaintiff having recovered a sum not exceeding £20, the Taxing-Master allowed half costs.—*Held*, on a motion to review taxation, on the ground that, under the Common Law Procedure Act 1856, s. 97, no costs ought to have been allowed, that the plaintiff was entitled to half costs, inasmuch as his house in the county of Cork was not his usual residence.

J. D. ROBINSON (with whom was *D. C. Heron*) moved, on behalf of the defendant, for an order that, in accordance with the 97th section of the Common Law Procedure Act 1856, the Taxing-Master do review his taxation of the plaintiff's costs in this action, and that plaintiff be disallowed all costs in the action; on the ground that, before and at the time of the commencement of this action, both the plaintiff and the defendant resided, and still reside, within the east riding of the county of Cork, and within the jurisdiction

Moffett v. M'Ternan (6 Ir. Jur. 177) followed.

of the Assistant-Barrister of that riding ; and that, pending such review, execution of the writ of *fi. fa.* issued by the plaintiff, and directed to the Sheriff of the county of the city of Cork, for recovery of the amount of said costs as taxed and certified, be stayed, or, in case the amount of said writ had been already levied, then that said Sheriff or the plaintiff (if the amount had been paid over to him) do bring in and lodge, with the proper officer of this Court, to the credit of this cause, so much of the sum so levied as may be equal to the amount of said costs. The motion originally came on to be heard before O'BRIEN, J., in Chamber, who directed it to stand over for the Full Court.

M. T. 1864.
Common Pleas
 DAWSON
v.
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It appeared, by the affidavit of the defendant, that the action had been brought for breach of contract relative to a mill, situate at Millfield, in the county of Cork, in which action the plaintiff claimed £66. 2s. 0d., but only recovered a verdict for £1. 18s. 2d.; that the cause of action sued for on the summons and plaint was wholly within the jurisdiction of the Assistant-Barrister of the east riding of the county of Cork, and that, before and at the time of the commencement of the suit, both plaintiff and defendant resided, and still reside within said riding ; that for the past three years plaintiff has had and still has a residence at Belleview, near Mallow, in said county, where plaintiff had been in the habit of spending from four to five months of each of said three years. The Taxing-Master had allowed plaintiff half costs, under the Common Law Procedure Amendment Act 1853, s. 243. On the other hand, the plaintiff deposed that his fixed and permanent residence was then, and for upwards of thirty-six years last past had been, in the neighbourhood of the city of Dublin, where he was obliged to reside, holding, as he did, the office of clerk of appearances and writs in her Majesty's High Court of Chancery in Ireland; and that for upwards of twenty years his fixed and permanent residence had been and still was at No. 30 Pembroke-place, in the county of Dublin, where, and not at Belleview, plaintiff resided on the 30th of May previous, which was the date of the issue of the summons and plaint, and thence up to the month of July following; that his house at Belleview was not his general

M. T. 1864. voter of the county of Cork, as a rated occupier in that county, in respect of his said house. But still the question remains, whether he does *reside* within the meaning of the 97th section, which makes no distinction between the residence of the plaintiff and defendant, the words being "when the parties reside within "the jurisdiction of the Civil-bill Courts of the county in which "the cause of action has arisen." In the case of *Darcy v. Hastings* we decided that a plaintiff who actually resided at Blackrock, in the county of Dublin, but who carried on business at his office in D'Olier-street, in the city of Dublin, was not entitled to costs, he having sued a person residing in the city in relation to a cause of action arising there, on the ground that under the express terms of the Civil-bill Act, he, the plaintiff, having an office in the city, was liable to be sued in the Civil-bill Court there; and that under the 97th section of the Common Law Procedure Act plaintiff was bound to sue in the Civil-bill Court when he had a residence rendering him liable to be sued as defendant. A question similar in some respects came before Baron Greene, in the Court of Exchequer, in *Butler v. Corcoran (a)*. The effect of the decision there was, that the word "reside," in the 97th section of the Common Law Procedure Act 1856, must refer to such a residence as would be sufficient for the purposes of the Civil-bill Act; and he accordingly decided that the plaintiff, a contractor for the execution of works at a barracks, occupying an office therein for the temporary purpose of carrying on the works, had not such a residence therein as to bring the case within the 97th section. I cite that case for the purpose of showing that, according to the opinion of that eminent Judge, the residence of the plaintiff must be such as would render him liable to be sued as a defendant in the Civil-bill Court. Then the question arises, suppose that Dawson were sued as defendant in the Civil-bill Court, could he be so sued in the county of Cork. The 40th section of the Civil-bill Act is the same in its terms as the 97th section of the other Act. That was repealed by the Common Law Procedure Act 1853, but was re-enacted by the Act of 1856. The words of the 69th section

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v.
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(a) 7 Ir. Com. Law Rep. 276.

are, "No defendant shall be liable to be sued, &c., out of the division in which he usually resides." Therefore, the question is, whether the plaintiff usually resides at his country-house near Mallow. I am of opinion, that the usual *residence* of Mr. Dawson is in the county of Dublin, and that his place near Mallow cannot be considered as his usual residence. I for some time felt some difficulty as to what ought to be the construction of the statute on this point, but, on further consideration, I concur with the rest of the Court in holding as I have stated, and further, that this question is concluded by the authority of the case of *Moffett v. M'Ternan (a)*, decided by the Court of Exchequer. The facts of that case, which was a motion in an action the trial of which took place before me at Sligo, were these:—The defendant resided in the county of Sligo, and the plaintiff Moffett recovered a verdict for so small a sum as would have been insufficient to entitle him to costs, in case he also resided there: it appeared, however, that he had a house in Dublin, which was his registered place of business, and in which he and his family resided during the greater part of the year, and that at commencement of the long vacation he usually went with his family and servants to Sligo, where he lived for three months. The Court of Exchequer, after some difficulty, came to the conclusion that, in order to come within the terms of the 97th section, the plaintiff ought to have the same description of residence as would enable him to be sued in case he were a defendant, and that this must be his *usual* residence: and they held that Sligo was not the *usual* residence of the plaintiff. It is true that there was no power of appealing from that order; and we are not bound to follow that decision, if we thought it erroneous. But it is sufficient to remove the doubt which I would otherwise have experienced. Therefore, we must refuse this application, with costs.

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Common Pleas
 DAWSON
v.
 COLEMAN.

(a) 6 Ir. Jur. 177.

M. T. 1862.
Queen's Bench

THE QUEEN, at the prosecution of JOHN BLACKBORN, jun.,
 v.
 THE MIDLAND COUNTIES AND SHANNON JUNCTION
 RAILWAY COMPANY.*

Nov. 11,
 Dec. 13.

(*Queen's Bench.*)

Mandamus.—
 B, a share-
 holder duly
 registered,
 having paid
 one call, trans-
 fers his shares
 to one L. F.
 an infant. The
 Company re-
 fusing to re-
 gister such
 transfer, B,
 applied for a
mandamus.

Held, that this
 Court should
 not compel the
 Company to
 register a
 transfer which
 might be re-
 pudiated here-
 after by the
 transferee.

MANDAMUS.—The prosecutor, John Blackburn of *Clara*, in the *King's County*, in his affidavit, which was filed on the 17th of January 1862, stated these facts:—About the end of 1860 the prosecutor subscribed for ten shares of £10 each in this Company, which obtained its Act of Incorporation (24 & 25 *Vic.*, L. & P. c. 246) on the 6th of August 1861. With that Act were incorporated the Companies Clauses Consolidation Act 1845, and the Lands Clauses Consolidation Act 1845. The 8th section of the Company's Act provided that £2 per share should be the greatest amount of any one call, and that at least three months must elapse between successive calls. A call of £2 per share, payable on the 1st November 1861, was made, and the amount due by the prosecutor in respect of that call was paid by him on the 21st of October 1861. On the 30th of that month, the prosecutor executed a deed of transfer of his ten shares, to one Leonard Fuller, who accepted the transfer. This deed was executed pursuant to the provisions of the Companies Clauses Consolidation Act 1845. A Mr. Kent, on behalf of the prosecutor and others, wrote, to the Company's then secretary, a letter dated the 1st of November 1861, in which was inclosed (amongst other deeds of transfer) that executed by the prosecutor, and a like deed whereby one George Barton transferred his ten shares to one Joseph Crea. The letter required the secretary to register the transfers, and transmit to Mr. Kent the certificates of registry. The secretary's reply, dated the 2nd of November 1861, was in these words:—"Sir, I beg to

* Before the Full Court.

"inform you, that I am directed to return you the inclosed transfers which I received this day." On the 6th of the same month, Mr. Kent wrote to the secretary for his reasons for declining to register the transfers. The secretary, in reply, referred Mr. Kent to the Company's solicitor for the reasons, and concluded his letter with this paragraph:—"I may however tell you, that we look upon the matter as a fraudulent transaction towards the above Company, and I have in my possession a letter from one of your acceptors of the transfers, declining to have any further to do with it, and requesting to have his signature to the so-called transfer cancelled. I suppose he does not fancy a term of imprisonment." The prosecutor stated his belief that the letter referred to was one written by Joseph Crea, who had told the prosecutor that, after Barton's deed of transfer had been sent to the secretary to be registered, he (Crea) had been sent for to the Clara railway station, to see the secretary, who asked him if he knew the danger he incurred in accepting the transfer; and after holding out various threats to him, finally stated that he would be imprisoned for life if he had anything to do with the transfer, and strongly urged him to save himself from such imprisonment, by withdrawing from the matter, by writing a letter to the Company's solicitor, stating that he (Crea) would have nothing to do with the transfer, and requesting that it might not be registered. Crea being, as he told the prosecutor, then greatly frightened, returned home, and, in pursuance of the secretary's suggestions, wrote a letter to that effect to the solicitor. On the 14th of November 1861, the first half-yearly meeting of the shareholders was held at the office of the Company's solicitor, and the common seal of the Company was then affixed to the the register of shareholders. In the *Freeman's Journal* newspaper of the following day appeared a report of that meeting. The prosecutor referred to that report as evidence of the intimidation used towards himself and others. It was further stated that Leonard Fuller continues ready and willing to take the shares, and fully concurs in the present application. The prosecutor then claimed a right in himself and Leonard Fuller to have a memorial of the deed of transfer

M. T. 1862.
Queen's Bench
THE QUEEN
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MIDLAND
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ETC.,
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entered by the secretary on the register of transfers, and to have a certificate thereof delivered to the transferee, pursuant to the Companies Clauses Consolidation Act 1845.

Upon this affidavit, the Court granted a conditional order for a writ of *mandamus* directed to the Company, commanding them by their secretary to enter on their register of transfers a memorial of the deed of transfer of the prosecutor's shares to Leonard Fuller, and to endorse such entry on the deed of transfer.

As cause against this conditional order, an affidavit was filed by John Blackburn of *Kilmackland, in the King's County*, who stated that his sister was the mother of Leonard Fuller, who was born about the month of July 1843, and was baptized on the 9th of that month, and was not on the 30th of October 1861, and is not now, of the full age of twenty-one years.

Mr. Hackett, who had been secretary to the Company from the 7th of October 1861, till the date of his resignation in the following month, also made an affidavit, in which he positively denied that he had "held out various threats" to Joseph Crea, or "finally stated" that Crea would be imprisoned for life if he had anything to do "with the transfer;" but admitted that he asked Crea if he was really going to take Mr. Barton's shares, and pay up the calls on them? Crea answered that he knew nothing about the shares; that he, at Mr. Barton's request, had signed the transfer paper, but had no money, nor any intention to pay anything on the shares. The secretary rejoined that Crea, by signing the transfer paper, had placed himself "in Mr. Barton's shoes," and that the Company would look to him (Crea) for payment of the calls, and would press the matter by law; that Crea should then either pay the amount of the calls or go to gaol, whence he (as the secretary believed) could not come out under the Insolvent Act, but would most likely be in gaol for life, as it was evidently a fraudulent transaction. Crea thereupon expressed a wish to have nothing more to do with it. Whereupon the secretary told Crea not to be guided by what he (the secretary) had said, but to consult a lawyer, and take the best advice how to act. The secretary's affidavit further stated, that his intention was, not to intimidate Crea, but merely to explain to him

the liability incurred by accepting a transfer of the shares; and that Leonard Fuller, the transferee, is a laboring boy in the employment of, and living with the prosecutor, at trifling wages (if any), that he is under the age of twenty-one years, and is wholly unable to pay up the calls, as his only means are the trifling wages (if any) received from his employer. There was a further statement, on belief, that the consideration (£15) mentioned in the deed of transfer was purely fictitious, and that the transfer, assigning the shares to a pauper, was made merely in order to rid the prosecutor, who is a farmer of means, from this liability to the Company.

The Company's solicitor, in his affidavit, stated that the subscription contract, dated the 13th of October 1860, provided that a deposit of £1 per share should be paid by each subscriber, at or previous to the time of signing the deed, which was duly executed by the prosecutor; and that the provisional directors raised the amount on their own personal security. On the 25th of January 1861, the provisional directors made a call of ten shillings per share, as a portion of the £1 deposit, and called in the remaining ten shillings by a resolution of the 25th of July following. The £1 per share will prove insufficient for the purposes mentioned in the subscription contract, the resolutions calling in that money were duly passed after the Act was obtained, and the prosecutor has never paid up any portion of the deposit money. The solicitor submitted that the conditional order should be discharged, for three reasons:—because the deposit money of £1 per share has never been paid by the prosecutor.

Because the transfer was colorable only, and was made fraudulently for the purpose of evading the prosecutor's liability to the Company.

Because Leonard Fuller was, at the time of the transfer, under the age of twenty-one years.

Heron, C. R. Barry, and Finch White, showed cause.

The facts having been stated.—[FITZGERALD, J. Is the prosecutor on the register?]
—Yes.—[FITZGERALD, J. The reason why I ask the question is, that it seems difficult to oppose the transfer of

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shares by a registered shareholder, on the ground of the non-payment by him of a sum which he agreed to pay, before the Act under which he is registered had passed.]—The Court will not by a writ of *mandamus* compel a company to register as a shareholder an infant.—[FITZGERALD, J. Has it not been decided that an infant may be a shareholder, and is liable to pay calls?—A plea of infancy has been held a good plea *in bar* to an action for the amount of calls: *Newry and Enniskillen Railway Company v. Coombe* (a); *Birkenhead, Lancashire and Chester Junction Railway Company v. Pilcher* (b). The authorities have further decided that the transferor of shares to an infant remains liable as a shareholder: *Reid's case* (c). A company is justified in refusing to register a transfer of shares to an infant: *Stikeman v. Dawson* (d); *Wordsworth on Joint-stock Companies*, p. 104. The transferee is a laboring boy.—[O'BRIEN, J. Has it not been held that a man may assign to a pauper?—But the Court will not be active in assisting the prosecutor to complete the assignment to an assignee who is under his control, and who will have to re-assign the shares as soon as the liability to pay the deposit-money ceases, or grant this prerogative writ, for the purpose of enabling the prosecutor to commit a fraud. The prosecutor studiously omitted from his affidavit the fact that he had covenanted by the subscription contract to pay the deposit-money.—[O'BRIEN, J. How will the Company be in a worse position if we grant the writ? Can they not sue the prosecutor on his covenant in the subscription contract?—That is no reason why the Court should help him by granting a writ which is not grantable as of right. He has obtained the benefit of the money subscribed by the other shareholders to pay the preliminary expenses; and his shares are so far increased in value. The 8 Vic. c. 16, s. 14, enacts that "every transfer" of shares "shall be "by deed duly stamped, in which the consideration shall be truly "stated." The consideration in this deed is "purely fictitious."

(a) 3 Exch. Rep. 565.

(b) 5 Exch. Rep. 24 ; S. C., 6 Rail. Cas. 622.

(c) 24 Beav. 318.

(d) 4 Rail. Cas. 585.

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It is the right of every shareholder to transfer his shares, even with the avowed object of evading his liability. The only qualification of that general rule is, that the transfer must not be merely colorable so far that the transferor retains an interest in the shares which the deed purports to transfer: *Huddersfield Canal Company v. Buckley* (a). The principles laid down in that case are identical with the provisions respecting transfers in the 8 Vic., c. 16. A shareholder's right to transfer his shares to a pauper is matter of necessity, because nobody but a pauper would accept them.—[LEFROY, C. J. What do you say on the question of infancy?—The fact that the transferee is an infant is no answer to an action for the amount of calls: *The Cork and Bandon Railway Company v. Cazenave* (b); *Midland Great Western Railway Company of Ireland v. Quinn* (c). The question arises very often in Courts of Equity. The true principle is, that the Court will not grant the writ if there is a secret arrangement subsisting between the parties that the transferee is to be only the nominal proprietor of the shares, while the property really remains in the transferor: *Hyam's case* (d). But here there is no allegation of a secret trust for the benefit of the transferor. The subscription contract on the face of it was manifestly intended to last only until the Act was obtained.—[O'BRIEN, J. In *Reid's case* the Court refused to follow the decision in the *Cork and Bandon Railway Company v. Cazenave*. On principle it is hard to understand the prosecutor's right; for what remedy could the Company have against an infant if he pleaded infancy?—The 8 Vic., c. 16, does not say that every transferee must be of full age.—[Barry referred to the rule laid down in *Add. on Contracts* (last ed.), p. 941, and *The Dublin and Wicklow Railway Company v. Black* (e).—That case did not decide the point at all.—[FITZGERALD, J. In *Reid's case* Sir J. Romilly said:—“Where a man, holding shares in a railway company, voluntarily

(a) 7 T. R. 36.

(b) 10 Q. B. 935.

(c) 1 Ir. Com. Law Rep. 391

(d) 1 De G., F. & J. 75.

(e) 8 Exch. Rep. 181.

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THE QUEEN "youth a shareholder in the railway company." That is a *dictum*
v. only; but it is in point. It would seem very strange if we could
MIDLAND force this boy on the Company, who have no way of getting rid
COUNTIES, of him until he becomes of full age.]—*Costello's case* (a).
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Barry.

It is not necessary for me to add any observation to those which have been made on the question of infancy. The only question is, whether the Court will be active to put by *mandamus* on the register a man who, the next moment, may serve a notice of repudiation, and thus escape all liability? We contend that this writ will not be granted to register an assignee who confers on the Company no correlative rights. A shareholder can get rid of his liability only by transfer, which, if it was originally a nullity, would be void. This application is an attempt to obtain the same result indirectly by the aid of the Court. In *The Queen v. The Liverpool, Manchester, and Newcastle Railway Company* (b) the Court refused to interfere by *mandamus*, and left the party to his remedy at law. The infant in the present case should be left to bring his action against the Company. This transfer is merely colorable, for there was no consideration paid: *Ex parte Budd* (c). Besides, the prosecutor has no right to make this application; the transferee should be the prosecutor.—[FITZGERALD, J. If the prosecutor is right in other respects, does it not follow that he is entitled to make this application to compel the Company to register the transfer?—No; because, if the transfer was a good transfer, the transferor, from the moment at which he executed the deed of transfer, ceased to be a member of the Company.—[O'BRIEN, J. The law is otherwise. It is only the registration which frees him from liability.]—However, it is not necessary to embarrass the case with that question.

Cur. adv. vult.

(a) 2 De G., F. & J. 302.

(b) 21 Law Jour., N. S., Q. B., 284.

(c) 31 Law Jour., N. S., Ch., 4.

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In this case, we are all of opinion that the application for a *mandamus* should be refused, and the conditional order discharged. The facts of the case, so far as they relate to the purpose for which the transfer was executed, the non-payment of any money whatever for the transfer (though £15 is untrue stated in it as having been paid), the poverty of the transferee, and his being in the employment of the transferor, and also the non-payment of the original deposit of £1 per share, are substantially the same as those in the case of *Joseph Crea*, which has been also argued before us. But there is in this case a further very material circumstance, on which the Company strongly rely, namely, that Leonard Fuller the transferee was, at the time of the transfer, and still is, an infant under the age of twenty-one years; and they rely on that circumstance in two ways—first, as being of itself a sufficient ground in point of law for not compelling them to register the transfer; and, second, as being a ground (having regard to the other undisputed facts of the case) for our coming to the conclusion that the transfer was not an absolute transfer of all Mr. Blackburn's interest in the shares, and was not intended to operate as such, but was merely a colorable transaction, whereby Mr. Blackburn sought to reserve to himself the benefit of the shares in case they should hereafter prove valuable. With respect to the first of these grounds, we are of opinion that the fact of infancy is a complete answer to the present application to register the transfer. It is true that infants may, in certain cases, become shareholders, and that the statute in some of its provisions contemplates the fact of their being so.—[*See* 8 & 9 *Vic.*, c. 16, s. 79, as to the voting of an infant shareholder.]—Infants may acquire shares by marriage, &c.; but when an infant is alleged to become a shareholder by a deed of transfer having been executed to him, the question is to be considered as that of a case of contract, subject to the ordinary rules, that the infant may, during his minority, or on attaining his full age, repudiate the contract, and decline to accept the transfer. If the transfer should be one of shares fully paid up, on which no further calls are to be made, it is not likely that there would be any repudiation either during infancy

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or on majority; and the Company might not raise any objection to the registering of the transfer; but when (as in the case now before us) several calls are still to be made on the shares, and the Company object to the transfer on the ground, amongst others, of the infancy of the transferee, I am of opinion that we should not compel them to register such a transfer. In what position would the Company be placed by our doing so? The original shareholder would have been discharged from all liability for future calls; and a shareholder would be ostensibly substituted in his place, who might defeat any action brought against him by the Company for calls. The case of *The Newry and Enniskillen Railway Company v. Coombe (a)* is an authority on this point. That was an action for calls, in which the defendant pleaded that he became the holder of the shares by reason of his having contracted and subscribed for them; that at the time of his doing so he was an infant; that while he was an infant he repudiated the contract and subscriptions, and gave notice to plaintiffs thereof, and of his holding the shares at their disposal, and that he had since held them at their disposal. There was a demurrer to this plea, on the grounds, amongst others, that it did not show that defendant repudiated the contract, or refused to continue in possession of the shares after his attaining the age of twenty-one years; and that the plea did not show that defendant was still under twenty-one, or show any other good cause why defendant was not liable for the calls. But upon argument the plea was held good, on the ground that it was competent for defendant to repudiate the contract, not only on his attaining full age, but also during his minority; and Baron Rolfe, in his judgment, states that:—"When the statute says all persons subscribing shall become shareholders, it means all persons who by law can enter into contracts." A similar answer might be given to one of the arguments urged by Mr. Blackburn's Counsel, that the statute contemplated that all persons might become transferees of shares. The principle of this decision, which has not been since impeached, applies equally to the case of an infant becoming a shareholder by transfer; and, accordingly, if Fuller was now registered as a shareholder, he might,

(a) 3 Exch. 565.

either during his infancy or on his attaining full age, repudiate the transfer, on the ground of its being made during his infancy. He might give notice thereof to the Company, and rely on such repudiation and notice as a defence to any action for calls. The cases relied on by Mr. Blackburn's Counsel do not conflict with the foregoing decision. In one of them, *The Birkenhead Railway Company v. Pilcher* (a), the plea relying on defendant's infancy at the time he became a shareholder by contract was held bad, because it did not aver a repudiation of the contract, or that defendant was still a minor; but Baron Parke, delivering the judgment of the Court, recognised the authority of their previous decision. Again, in *The Cork and Bandon Railway Company v. Casenove* (b), the Court held the plea bad, because it contained no statement of repudiation; and there judgment was on the assumption that defendant assented to and ratified the purchase after he attained full age. And, with respect to the case of *The Midland Railway Company of Ireland v. Quinn* (c), it will be seen, by referring to it, that the pleas relying on infancy were held bad, because they did not contain certain averments of repudiation and abandonment of all interest in the shares. It appears to us therefore that, if we compelled the Company to register the transfer now before us, it would be clearly in the power of Leonard Fuller the transferee to free himself from all liability for future calls, and to defeat any action brought against him by the Company for such calls; and that accordingly we should not compel the Company to do what would be attended with such results; and that the statute did not contemplate that they should be obliged to register such a transfer.

I have the authority of my LORD CHIEF JUSTICE for stating that, without expressing any opinion as to the liability of an infant, or the effect of a transfer to an infant, the fact of infancy is, in his opinion, a material circumstance for testing the *bona fides* of the transfer, whether the infant was not selected as the transferee for the purpose of enabling the transferor to assert, at a future time,

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(a) 5 Exch. 24.

(b) 10 Q. B. 935.

(c) 1 Ir. Com. Law Rep. 383.

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his title to the shares. It was also observed in the argument that the present application was made by Mr. Blackburn, and not on behalf of the alleged transferee. I think it sufficient, however, to rest my decision upon the ground I have already stated.

HAYES, J.

I agree with my brother O'BRIEN that the writ of *mandamus* should be refused in this case. I think that the granting of it would be not only an indiscreet, but an unjust exercise of the prerogative extended to us. I say indiscreet, for upon the face of this transaction, which the prosecutor calls upon us to confirm, there are several facts which, in my opinion, lead to the conclusion that it never was the intention of the prosecutor, absolutely and *bona fide*, to get rid of his property in the shares, and that there are strong grounds for suspecting that by this transaction, which is now impeached as being colorable, fraudulent, and entered into for the mere purpose of evading liability, the prosecutor meant only to place these shares in safe hands, from whence he might hereafter get them back if times should improve. How far he has succeeded in this, is another matter. I say also, that this would be an unjust exercise of our jurisdiction, for whilst we acknowledge the rights of the individual shareholder, we must bear in mind that rights have been also secured to the Company. Thus, the Company has a right to compel the shareholders for the time being to pay up their calls; and on refusal or neglect so to do, to proceed to have the shares declared forfeit. From the long series of cases to be found in the books, we are aware of the difficulty experienced in making infant shareholders liable upon an action for calls, and it is only necessary to read the clauses relating to forfeiture, to see that there is a region of difficulty, though to a great extent still unexplored, as to the effectuating the forfeiture of an infant's shares, and therefore I think it would be unjust for us, at the call of a transferor, who is *sui juris*, to compel the registry of assignment to a person who is not *sui juris*, and as against whom the Company would

probably experience great difficulty in enforcing their legislative rights.

FITZGERALD, J.

I concur in the conclusion at which the other Members of the Court have arrived, only desiring to observe that in this case the transferor does not intervene, or give in any claim.

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v.

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RAILWAY COMPANY.*

Nov. 12.
Dec. 13.

In this case the prosecutor was the transferee of the shares, and his affidavit was, except in the particulars mentioned below, indetical with that of the prosecutor mentioned in the last case. The name of the transferor of the shares is George Barton, and the prosecutor is the person who wrote the letter referred to by the secretary.

The conditional order was the same, *mutatis mutandis*, as that in the former case.

The secretary's affidavit was also a transcript of that which he

Mandamus.—
B, a duly registered shareholder, having paid one call, transferred his shares to C, a pauper. The Company refusing to register said transfer, B applied for a *mandamus*.

Held, that such transfer, though made to relieve B from liability, was allowed by the statute, if there was no trust for the benefit of B.

Held also (*dubitante* FITZGERALD, J.), that the facts that C was a pauper, in the employment of B, and that the deed of transfer stated a consideration, though none passed, were not sufficient to render the transfer merely colorable.

Held also (*dubitante* FITZGERALD, J.), that though the granting a writ of *mandamus* is discretionary with the Court, the fact that the object of the transfer was to relieve B from liability would not justify the Court in leaving C to his action under the Common Law Procedure Act 1856.

Held also, that the 8 & 9 Vic., c. 16, s. 14, does not render a deed invalid in which a larger consideration is stated than actually passed.

Held also, that where untrue consideration is stated in the deed, the fact that no consideration passed will not render the instrument a deed of gift, liable to stamp-duty as such.

* Before the Full Court.

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"J. D. MELDON, Esq.

Clara, Nov. 3, 1861.

"Sir,—I have signed my hand *to a form*, accepting of ten shares "in the Shannon Junction Railway, transferred to me by George "Barton of Clara, not then knowing the liability under which I "was bringing myself, and since that I have received information "letting me know the danger to which I exposed myself; and as I "am unable to pay any sum of money which may be called for, I "will decline it, if it may please you to do so. Hoping that you "will proceed no further, and that you will have my name crossed "off, I am, &c.,—JOSEPH CREA."

Heron, C. R. Barry, and Finch White, showed cause.

The question of infancy does not arise in this case. The other grounds upon which cause is shown are the same, so that it is not necessary to cite again the cases on the subject. *Costello's case* (a) was cited to establish the proposition that every shareholder has a right to transfer his shares to *any* person, even to an insolvent. That general right is qualified by the condition stated in the judgment of Turner, L. J., in that case :—"In all cases the transfer "must be a *bona fide* transfer; using the words *bona fide* transfer "in the sense that the transfer is not to be a mere colorable and "unsubstantial transaction."—[O'BRIEN, J. What is the test of *bona fides* ?]—An intention on the part of the transferee to buy, and of the transferor to sell the shares *out and out*. A transfer for which no consideration was or is to be paid does not answer that description, especially since the 8 Vic., c. 16, s. 14, requires the consideration to be truly stated.—[O'BRIEN, J. That provision

(a) 2 De Gex, F. & Jones, 302.

clearly applies only to the necessity to pay the full amount of stamp-duty.]—In *Ex parte Budd* (a) the transferee's name was erased from the list of contributories, and the name of the original purchaser replaced on it, because the transaction was colorable.—[O'BRIEN, J. The sale in that case was, *as between the transferee and the transferor*, improper; for it is evident that the transferor continued to regard himself as the true proprietor of the shares.]—At all events, the Court will not grant the prerogative writ to help the perpetration of a fraud, when the transferee may, under the Common Law Procedure Act 1856, claim a writ of *mandamus* in a action at Common Law.

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If the true nature and result of the transfer was to pass absolutely all the property in the shares from the transferor to the transferee, the transferee is entitled to get the writ of *mandamus*, even though the avowed object of the transfer was to free the transferor from all liability, by transferring his shares to a pauper. No case of a secret trust for the transferor has been made. It has been argued that the transfer is not *bona fide*, because no consideration was paid. But no case has yet decided that the non-payment of the consideration stated in the deed is conclusive evidence that the transfer was *not bona fide*. No doubt, the 8 *Vic.*, c. 16, s. 14, requires a true statement of the consideration, but the context shows that for fiscal purposes that section was enacted. Had the consideration stated in the deed been £100, though £95 only had been paid, the deed would not be invalid, though the statement of the consideration was undoubtedly false. In *Costello's case* (b) the Lords Justices were careful to show that the authorities are uniformly in favor of allowing a transfer to a pauper, provided it is absolute. The same doctrine was laid down in *Budd's case* (c), and in *De Pass's case* (d). In order to validate the transfer, there was no need to mention in the deed any consideration whatsoever.

(a) 31 L. J., N. S., Ch., 4.

(b) 2 De G., F. & J. 302.

(c) 30 Beav. 143; affirmed on appeal, 31 L. J., N. S., Ch., 4.

(d) 4 De G. & Jones, 544.

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"Sir,—I have signed my hand *to a form*, accepting of ten shares "in the Shannon Junction Railway, transferred to me by George "Barton of Clara, not then knowing the liability under which I "was bringing myself, and since that I have received information "letting me know the danger to which I exposed myself; and as I "am unable to pay any sum of money which may be called for, I "will decline it, if it may please you to do so. Hoping that you "will proceed no further, and that you will have my name crossed "off, I am, &c.,—JOSEPH CREA."

Heron, C. R. Barry, and Finch White, showed cause.

The question of infancy does not arise in this case. The other grounds upon which cause is shown are the same, so that it is not necessary to cite again the cases on the subject. *Costello's case* (a) was cited to establish the proposition that every shareholder has a right to transfer his shares to *any* person, even to an insolvent. That general right is qualified by the condition stated in the judgment of Turner, L. J., in that case :—"In all cases the transfer "must be a *bona fide* transfer; using the words *bona fide* transfer "in the sense that the transfer is not to be a mere colorable and "unsubstantial transaction."—[O'BRIEN, J. What is the test of *bona fides* ?]—An intention on the part of the transferee to buy, and of the transferor to sell the shares *out and out*. A transfer for which no consideration was or is to be paid does not answer that description, especially since the 8 *Vic.*, c. 16, s. 14, requires the consideration to be truly stated.—[O'BRIEN, J. That provision

(a) 2 De Gex, F. & Jones, 302.

clearly applies only to the necessity to pay the full amount of stamp-duty.]—In *Ex parte Budd* (a) the transferee's name was erased from the list of contributories, and the name of the original purchaser replaced on it, because the transaction was colorable.—[O'BRIEN, J. The sale in that case was, *as between the transferee and the transferor*, improper; for it is evident that the transferor continued to regard himself as the true proprietor of the shares.]—At all events, the Court will not grant the prerogative writ to help the perpetration of a fraud, when the transferee may, under the Common Law Procedure Act 1856, claim a writ of *mandamus* in a action at Common Law.

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If the true nature and result of the transfer was to pass absolutely all the property in the shares from the transferor to the transferee, the transferee is entitled to get the writ of *mandamus*, even though the avowed object of the transfer was to free the transferor from all liability, by transferring his shares to a pauper. No case of a secret trust for the transferor has been made. It has been argued that the transfer is not *bona fide*, because no consideration was paid. But no case has yet decided that the non-payment of the consideration stated in the deed is conclusive evidence that the transfer was *not bona fide*. No doubt, the 8 *Vic.*, c. 16, s. 14, requires a true statement of the consideration, but the context shows that for fiscal purposes that section was enacted. Had the consideration stated in the deed been £100, though £95 only had been paid, the deed would not be invalid, though the statement of the consideration was undoubtedly false. In *Costello's case* (b) the Lords Justices were careful to show that the authorities are uniformly in favor of allowing a transfer to a pauper, provided it is absolute. The same doctrine was laid down in *Budd's case* (c), and in *De Pass's case* (d). In order to validate the transfer, there was no need to mention in the deed any consideration whatsoever.

(a) 31 L. J., N. S., Ch., 4.

(b) 2 De G., F. & J. 302.

(c) 30 Beav. 143; affirmed on appeal, 31 L. J., N. S., Ch., 4.

(d) 4 De G. & Jones, 544.

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had made in the last case, except in the description of the prosecutor, who is a shopman or apprentice to George Barton, and is entirely dependant on him, and has no means of paying up the calls, as he told the deponent that he had no money to pay any calls. George Barton was described as "a solvent and respectable man."

The solicitor's affidavit differed from his former one only by changing the names of the parties, and setting out the following letter :—

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Clara, Nov. 3, 1861.

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The Company's Act entirely displaced the subscription contract, which stipulated that the deposit money was to be paid *before* the Act was obtained. Let the Company sue the transferor on his covenant.

Barry, in reply.

The prerogative writ of *mandamus* has always been retained for the purpose of supplying defects in the ordinary proceedings, but, *being in the discretion of the Court*, has never yet been prostituted to help a party who is not without other remedy, in giving effect to a deed to which he is a party, and which he admits to contain a falsehood in a material part, the statement of the consideration, which was inserted for the purpose of deceiving the Company into the belief that the transfer was made *bona fide*. The argument that the 8 *Vic.*, c. 16, s. 14, contemplated the revenue only when it required the consideration to be truly stated, is fatal to the application, because the deed is not sufficiently stamped.

Phillips objected that no such point was made in the affidavits, or even in the opening statement of Mr. *Heron*.

Per Curiam.—We will hear the point argued.

Barry.—The deed bears only a stamp of 2s. 6d. But, as it has been admitted that no consideration was paid, the deed was a deed of gift, and therefore requires a stamp to the amount of £1. 15s. 0d., under the 13 & 14 *Vic.*, c. 97, so that the deed ought not to be registered. The evidence is strong enough to make the Court *presume* a secret trust for the transferor, and the applicant has not answered the Company's affidavit, in which it is expressly charged that the transfer is merely colorable, though he obtained from the Court an order giving him leave to file an affidavit in reply. The cases cited have no application here, because Courts of Equity have *no discretion* in the matter, but must simply inquire and determine who is the real owner of the shares? *Alexander's case* (a) however shows that the insertion of a consideration, where

(a) 9 W. Rep. 410.

none passed, is a strong circumstance to prove that the transfer was a sham. M. T. 1862.
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Phillips was allowed to argue that the stamp was sufficient.

Cur. adv. vult.

O'BRIEN, J.

Dec. 13.

In this case I am of opinion that the conditional order for a *mandamus* should be made absolute. The application is made by Mr. Crea, the transferee of ten shares in the Company, for the purpose of compelling the Company to have the transfer of said shares made to him by Mr. Barton duly registered under the statute, and is resisted by the Company, on various grounds. The ground principally relied on is, that the transfer was not a *bona fide* transaction, but a colorable one, and was executed to a pauper, for the purpose of discharging Mr. Barton from his liability to any future calls on his shares. Now, with respect to assignments of shares in public companies, such as the present, the principle has been established, by several cases, that the mere fact of an assignment being executed for the purpose of getting rid of such liability, even though it be executed without any consideration having been paid whatever, does not of itself invalidate the transaction, provided there be not any secret trust, arrangement or understanding, whereby the alleged transferor would still retain some interest or control in respect of the shares. It is clear (and was not indeed disputed by the Company's Counsel) that the test of *bona fides* in such an assignment is, that the transferor should actually part with, and that the transferee should take, all the interest in and benefit of the shares. It has been argued that such an assignment made to a pauper is unfair to the rest of the shareholders; but it is to be considered that the right of transfer, and of exemption thereby from all liability for future calls, are given by the statute; and that, accordingly, everyone who enters into such companies should know that by doing so he places himself in the position of being left with insolvent, instead of solvent, fellow shareholders.

It was however urged, during the argument, that there were
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circumstances connected with the original formation of this Company which rendered it a breach of faith on Mr. Barton's part to avail of his statutable right to assign his shares to a person who had no means to meet his liabilities as a shareholder. In answer, to this it is said that the present application is made on the part of Mr. Crea, whose right to have the transfer registered should not be affected by any such circumstances; but, independent of that consideration, I am of opinion that the affidavits furnish no grounds for coming to the conclusion contended for by the Company, or for supposing that there was anything in Mr. Barton's conduct which amounted to an agreement or understanding with his fellow shareholders that he would not, whenever he wished, exercise his right of abandoning the concern, by a transfer of his shares, if he thought it likely to prove an unprofitable one.

It was also urged, that the fact of Mr. Barton not having paid any part of the original deposit of £1 per share deprives him of the right of assigning his shares to any person. But this objection cannot be sustained. The Company have registered Mr. Barton as a shareholder, and required him to pay the subsequent call of £2 per share, which he accordingly did. They might, if they thought fit, have insisted on the payment of the £1 deposit, before he executed the subscription deed; they may perhaps have still some remedy against him to recover the amount; they need not have put him on the registered list of shareholders; but, having done so, it is now too late for them to insist that he is deprived of the ordinary rights of a shareholder by the non-payment of that deposit.

The question however to which most of the argument has been applied is, whether, having regard to the circumstances under which this transfer has been made, it is to be considered as a *bona fide* transfer, or as a colorable one which the Court should refuse to enforce. It appears from the affidavits that Mr. Crea has no means to enable him to pay up the future calls; that he is the shopman or apprentice of Mr. Barton; that the transfer was executed to him for the purpose of releasing Barton from all liability to future calls; that it was executed without any money whatever having been paid for it; and that the statement

in the assignment of £15 having been paid for it is altogether untrue. These circumstances are certainly to be regarded in considering the question whether the transfer was executed with the intention that it should take effect as a complete and absolute assignment to Crea of all Barton's interest, right and title in and to the shares; or whether there was some agreement or understanding between Barton and Crea that the former should still retain some right or interest in respect of them; but if, notwithstanding those circumstances, we should come to the conclusion that the transfer was intended to operate as a complete and absolute assignment, without reserving to Barton any right, interest, or benefit whatever in respect of the shares, then I do not think that those circumstances should prevent our giving full effect to the transfer. Now, upon referring to the affidavits, I find nothing in them that would, in my opinion, warrant our concluding that there was between the parties any agreement or understanding, express or implied, that Mr. Barton should retain any right or interest in, or control over, the shares. It appears to me that the conclusion to be drawn from them is, that Mr. Barton, for the purpose of freeing himself from future calls, was willing and intended to part entirely with all his interest in the shares, and did not intend or desire to retain any right in, or derive any benefit from, what he considered would prove an unprofitable concern.

With respect to the letter from Crea to Mr. Meldon, I think that, considering the circumstances under which it was written, it should not affect our decision. It is evident, even from Mr. Hackett's affidavit, that Crea wrote the letter under the influence of threats held out to him by Mr. Hackett (a course of proceeding which, in my opinion, should not have been adopted); and Crea, by his affidavit for the present motion, states his willingness to abide by the transfer.

Some authorities were relied on by Counsel for the Company, which were observed on in the course of the argument; but, on referring to them, it will be found that there were circumstances which do not exist in the present case, and which clearly showed that the transfer was not really an absolute one, or intended to

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be so. In one of them, for instance, *Ex parte Budd* (a), it appeared, by the examination of Crocker the transferee, that the certificates of the shares were never delivered to him; that at the time of the transfer he clearly understood that Budd the transferor would hold him harmless, and that he Crocker never considered the shares as his own, but that they still belonged to Budd, and that Budd was holding them in Crocker's name; and further, that, when Crocker received letters from the company, he had sometimes told it to Budd, who desired him to take no notice of them. It also appeared that Budd, as the attorney for Crocker, but without any authority or communication with Crocker, had signed a document offering, upon Crocker's part, to pay £600 as a contribution towards payment of the company's debts, to prevent the winding-up. Under those circumstances, the Master of the Rolls decided that the transfer was not a *bona fide* one, and that Budd's name should be placed on the list of contributories; but, from his judgment, the ground of his decision appears to have been, that the dealings between the parties was such that, if the shares had become profitable, Budd might have insisted on Crocker's restoring them to him; and that if, on the other hand, Crocker had been made pecuniarily liable in respect of the shares, he might have called on Budd to indemnify him. The propriety of this decision cannot be questioned: it was confirmed by the Court of Appeal; but, the facts were so different from those now before us, that it does not, in my opinion, govern the present case.

In another case cited, that of the *Esgair Inwryn Mining Co.* (b), it appeared that the certificates of the shares were retained by Mr. Alexander the transferor, and that when Whitehead the transferee was applied to by the secretary to know if he would take some debentures about being issued by the company to the shareholders, he replied that he could not give any answer until he had seen Mr. Alexander. Vice-Chancellor Wood relied upon those facts, amongst others, as a ground for holding the transfer colorable; but though he came to that conclusion, yet he admitted in his judgment

(a) 31 Law Jour., Ch., 4.

(b) 9 W. Rep. 410.

the general principle acted upon in *De Pass's case* (a), that a transfer would be valid, even though nothing were paid by the transferee, and though it was avowedly made for the purpose of avoiding liability, and at a time when the company was in difficulty, if it was made absolutely and *bona fide*, and without any trust or reservation, for the benefit of the transferor. Again, in *Hyam's case* (b), where a transfer was also held invalid, and the names of the transferors were retained on the list of contributories, under circumstances different from those now before us, the Lord Chancellor, in his judgment, considered the result of previous decisions to be, that if it had been proved that the transferor had parted with all interest in the shares, though for the express purpose of getting rid of liability, and though they knew they were of no value, and that the transferee was a man of straw, still that the transferors would have been absolved from liability, and ought to be removed from the list of contributories. And Lord Justice Turner, in his judgment, stated that he entertained no doubt upon the question whether the transferors could have discharged themselves from their ownership by making an out and out transfer of the shares; but that in the case before him it was clear that the intent was to cover the real ownership by the creation of a fraudulent trust.

It has been further argued that the granting a writ of *mandamus* is discretionary with the Court, and that in the present case we should exercise that discretion, by declining to grant the writ on a summary application, and leave the applicant to such remedy as he may have, by bringing an action for a *mandamus* under the Common Law Procedure Act of 1856. But, where a discretion is vested in the Court, it should be regulated and exercised according to established rules; and, in my opinion, the circumstance of the transfer having been executed without consideration, and for the avowed purpose of exempting the transferor from future calls, is not a sufficient ground for us to exercise our discretion, by refusing to enforce the statutable right of the party, if we think that the transfer operated, and was intended so to do, as an absolute

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(a) 4 De G. & J. 544; S. C., 28 Law Jour., Ch., 776.

(b) 1 De G., F. & J. 75; S. C., 29 Law Jour., Ch., 244.

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The untrue statement in the deed of the payment of the £15 has been further relied on as furnishing a legal objection to the validity of the transfer, on the ground that the statute 8 & 9 Vic., c. 16, s. 14, requires the consideration to be truly stated; but, as I have already observed, during the argument, I think that such provision was inserted in the statute for fiscal purposes, in order to ensure that a stamp of the proper amount should be affixed to the deed, by prohibiting the insertion of a *lesser* sum than was actually paid; and that the provision is not so mandatory as that the insertion of a greater sum than was actually paid would vitiate the transfer. I believe that, as a matter of fact, it frequently happens that the consideration money stated in the deed as having been paid by the transferee, exceeds that which is actually received by the transferor. In the dealings on the Stock-Exchange with shares of this description, there are sometimes, before the execution of the deed of transfer, several intermediate sales and purchases between the first sales by the transferor and the final sale to the last purchaser to whom the transfer is executed; and, if he should have paid to his vendor a greater sum than the transferor received from the first purchaser, then such greater sum is the sum recited in the deed as having been paid to the transferor.

It was however further urged, at the close of the argument, though not relied on in the affidavits, that, as no money consideration was paid for the deed, it should be regarded as a deed of gift, liable to a stamp of £1. 15s. 0d., and that, accordingly, it is insufficiently stamped. But even supposing this objection now open to the party, I do not think that the mere fact of no money consideration having been paid would render the transfer in question a *deed of gift*, under the Stamp Act, liable to the duty of £1. 15s.; and it is to be observed, with respect both to this objection and the other grounded on the 14th section of the statute, that they were not relied on or noticed in the *Begair Inweyn Mining Company's case*, or in *Budd's case*, although in those cases, as in the

present, the consideration money was untruly stated in the deed of transfer, and no money consideration whatever was paid.

I am therefore of opinion that the conditional order for a *mandamus* should be made absolute.

HAYES, J.

I agree that the writ of *mandamus* ought to go; if the defendants think that there is any good ground for resisting the peremptory writ, they may state it upon the return, and thus put the matter in the course of solemn investigation. But at present, the conditional order must be made absolute. The applicant relies shortly upon a deed, which he says has transferred to him the absolute property in the shares. In opposition to that, it is alleged that the deed is merely a sham, and colorable; and it is insisted at the Bar, that that allegation is sufficient to put the applicant upon a full statement of all the facts and circumstances which have led to the execution of the deed. In that I do not concur. At most, it would have been sufficient to meet a general allegation, by a general denial that the transaction was colorable, or, so far as Crea was concerned, was made for the purpose of evading liability. But it has been relied upon by Mr. *Heron*, as a proof of *mala fides*, that the consideration mentioned in the deed has not been paid. That is a circumstance very deserving of consideration, but it is explicable in several ways, and we are not from that solitary fact to presume the existence of fraud to so great an extent as to nullify the transaction between the parties to it.

Mr. *Barry*, in the course of his argument, suggested a point to which I listened with great attention, because I felt it important as to the regulation of our proceedings in granting this prerogative writ of *mandamus*. He argued that, by granting the writ in the present case, we would be lending ourselves to a very gross fraud; for he said that this Company had been got up by some gentlemen of the country, who had formed themselves into a Railway Company, not for the purpose of making money in the ordinary course of railway traffic, but for the benefitting of the estates of the parties concerned as shareholders; that Mr. Barton was one of these, and

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that he having become a proprietor, upon the understanding that he would hold on with his co-owners for their mutual benefit, had no right to sell, and thus clear out of the venture as soon as he had got those co-owners fairly embarked in it. Now, assuming that to be a fraud on the part of Barton, and that Crea had become implicated in it, it occurred to me that this being a prerogative writ which has been preserved to the Crown as the fountain of justice, in order the better to supply the defects in the ordinary administration of justice, this Court, as the tribunal to which the wielding of that prerogative has been entrusted, would fail in its duty if we allowed the writ to be used for purposes of fraud. Therefore, I was anxious to hear what were the facts upon which Mr. Barry grounded that charge, and how he brought them home to Crea. I have listened attentively, but, in my opinion, no such case has been made out in either branch. This then is simply the application of a transferee, who, being avowedly a pauper, asks for the writ to perfect the conveyance of the shares to him, though he never paid anything for them, and though the direct and immediate effect of the transfer (and probably the intention of the parties also) is to free the transferor from liability. There being nothing, however, to lead my mind to the belief that there was any fraudulent arrangement, I think that Crea is to be deemed the real owner of the shares; that it was intended to pass to him the whole property, by the deed; and that he is now entitled to have the transfer registered.

FITZGERALD, J.

I would have preferred to leave the applicant to any remedy which he might have had under the Common Law Procedure Act (*Ir.*) 1856. If the applicant succeeded in establishing his title by an action, he might then claim a writ of *mandamus*, as of right. But I entertain very grave doubts whether we exercise a wise discretion in compelling the defendants to act upon a deed which, confessedly, is false upon the face of it, and false in a material particular. The real matter to be inquired into is, whether the transfer was a *bona fide* transaction, entered into with a real

purpose and intention of passing all the property in the shares of the applicant, or was merely a colorable device? When we are asked to enforce, by this prerogative writ, a transaction by which Mr. Barton professes to *give* to his clerk shares which impose on him considerable liability (a transaction suspicious in its nature), we should look at it with strictness, and investigate it in every particular; and we should expect full explanation as to how and when this deed was executed; and we ought to have had an affidavit from the witnesses to the deed, to explain the circumstances under which it was executed.

In reference to the letter of the 3rd of November 1861, written by Crea to the solicitor of the Company, I will not bind Crea by it. The Company's secretary had no right to try to induce parties not to accept shares which shareholders were willing to transfer to them. But, at the same time, while we do not bind Crea by that letter, we cannot shut our eyes to the statement in it, that he had signed "a form." That expression seems to import that the execution of the deed of transfer was not a real transaction, but was a form merely.

It is upon these grounds that I entertain grave doubts as to the propriety of the rule now made by the Court.

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April 22.

By the articles of association of a joint-stock bank it was provided that the directors should be entitled to set apart and receive for their remuneration in each and every year, commencing from the incorporation of the Company, a sum not exceeding £4000, and to divide the same among them as follows, namely, three-fourths to be paid to and divided amongst the directors forming the board in London, as they shall from time to time determine, and the remaining one-fourth thereof shall be allowed to and divided amongst the directors forming the said board in Dublin, as they may from time to time determine. The defendant was appointed a Dublin director, and acted as such for two years, and at the time of his appointment, a deed of covenant was entered into between him and the Company, by which he covenanted "to act and fill the position of one of the local board of directors in Dublin, at the scale of remuneration provided by the terms and articles of agreement of the said Company." There was one other director of the Dublin board. The board of directors never set apart any sum for the remuneration of directors. An action having been brought against defendant, for a debt alleged to be due by him to the Company, he set off his claim for remuneration of his services as a director. *Held*, that, there having been no setting apart of a fund on this purpose, said claim did not arise.

THIS was an action for the sum of £519. 13s. 3d. The summons and plaint contained the usual counts for money lent, money had and received, account stated, and interest. The defendant pleaded to the first and second counts:—first, that the said causes of action were in respect of one and the same demand, to wit, the sum of £416. 13s. 4d. and £83. 6s. 8d., making together the sum of £500 mentioned in the particulars indorsed on the said writ of summons and plaint. That the said sums of money were received by the defendant under the following circumstances, namely, that the plaintiffs are a Company duly formed, registered and incorporated pursuant to the provisions of the "Companies Act 1862," for the several purposes and objects set forth and enumerated in the memorandum of association of the said Company, which memorandum of association was duly subscribed, attested and registered pursuant to the said Act; and that by clause No. 12 of the articles of association of the said Company, which said articles accompanied the said memorandum of association, and were duly subscribed, attested and registered pursuant to the said Act, it is provided that the directors may establish such branch banks, agencies and local boards in any towns or places in Great Britain or Ireland, and make such regulations for their management as the directors from

time to time shall think proper, and for that purpose may appoint such local directors, managers, officers, clerks, and servants, with such remuneration, and at such salaries as they consider advisable; and may pay the expenses occasioned thereby out of the funds of the Company. And by clause 16 of the said articles of association, it is provided that the directors shall be entitled to set apart and receive for their remuneration in each and every year, commencing from the incorporation of the Company, a sum not exceeding £4000, and to divide the same among them in manner thereafter mentioned, that is to say, that three-fourths of the moneys so allowed shall be paid to and divided amongst the directors forming the board in London, as they shall from time to time determine, and the remaining one-fourth thereof shall be allowed to and divided amongst the directors forming the local board in Dublin, as they may from time to time determine. That the said plaintiffs were duly incorporated on the 5th day of January 1863, pursuant to the said statute, and to the said memorandum of association and articles of association; and that directors of the said Company were then duly named and appointed, pursuant to and under the said articles of association; and that after the due subscription and registration of the said memorandum of association and articles of association, respectively, and after the due incorporation of the said plaintiffs as such Company, and after the due appointment of said directors, the said directors did in the year 1863 establish a branch bank of the said Company in Ireland, at Dublin, and did thereupon duly appoint the defendant to be a director of the said English and Irish bank (limited), and to be a local director in Dublin of the said branch bank, in the manner and at the remuneration mentioned and contained in the deed next thereafter mentioned. That by a deed dated the 8th day of June 1863, and made between the defendant and one John Trew Gray of the one part, and the plaintiffs, under the said name and style of the English and Irish Bank (limited), of the other part, and which said deed was duly signed and sealed by the defendant and the said John Trew Gray, and was also duly sealed with the common seal of the plaintiffs, the said defendant did covenant with the said

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plaintiffs, their successors and assigns, that the defendant should and would, for the term of two years at the least, next ensuing the 1st day of July 1863, if so required by the said plaintiffs, act as a director of the said English and Irish Bank (limited), and should act as and fill the position of one of the local board of directors in Dublin, at the scale of remuneration provided by the memorandum of association of the said Company in that behalf; and would, unless unavoidably prevented by illness, diligently attend to and perform the duties of such director, and give his personal attendance and attention to the managing and transacting the business of the said bank in Dublin; and would, to the utmost of his ability, promote and attend to the interests of the said bank, and diligently perform all and singular the duties appertaining to such situation or office of director. That he was thereupon and in pursuance of the provisions of the said deed, to wit, on the 8th day of June 1863, required by the said plaintiffs to act as a director of the said English and Irish Bank (limited), and to act as and fill the position of one of the local board of directors in Dublin, upon the terms in the said deed, and thereafter set forth; and that he had from thence, up to, to wit, the 1st day of June 1864, acted as such director, and did during all the time last aforesaid act and fill the position of one of the local board of directors in Dublin, the said board consisting of two members, to wit, one Simon Foot and the defendant. That he did, during all the time aforesaid, diligently attend to and perform the duties of such director, and give his personal attendance and attention to the managing and transacting the business of the said bank in Dublin, and did, to the utmost of his ability, promote and attend to the interests of the said bank, and did diligently perform all and singular the duties appertaining to such situation or office of director. That he was always ready and willing to continue to act as such director, and to perform all the duties of the said office, pursuant to the said articles of association and the said deed of the 8th day of June 1863; and that, on the said 1st day of June 1864, the said plaintiffs ceased to carry on, and discontinued their said business, and became and were, on the said day, and still are

amalgamated with and merged in the European Bank (limited) and did thereupon, to wit, on the said 1st day of June 1864, cease to have any branch bank in Dublin, without any neglect or default of the defendant. That before the commencement of this suit, on the 1st day of July 1864, the sum of, to wit, £500 became and was due and owing by the plaintiffs to the said defendant, as such director as aforesaid, pursuant to the said articles of association, and to the said provisions of the said deed of the 8th day of June 1864, the same being according to and at the scale of remuneration in the said articles of association and in the said last-mentioned deed respectively provided. That all the conditions were performed, and all things happened and all times elapsed necessary to entitle the defendant to the payment of the said sum of £500 as such remuneration as aforesaid. That, after the performance of all such conditions, he the defendant retained said two sums of money endorsed on the said plaint, and hereinbefore mentioned, in liquidation of his said claim as such director as aforesaid, as he legally might, for the causes aforesaid.

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The defendant, secondly, pleaded the foregoing facts specially by way of set-off; and he pleaded, thirdly, a set-off in the ordinary form,—first, for work and services as a director, and for salary; secondly, for work and labour generally.

The plaintiffs replied to the first defence that the sum of £500 did not become, nor was it due and owing by the plaintiffs to the defendant as such director as alleged; nor were all conditions performed, nor did all things happen necessary to entitle the defendant to the payment of the said sum of £500 as such remuneration, as alleged; because, the plaintiffs say that the directors of the English and Irish Bank (limited) did not at any time set apart any sum of money for their remuneration, as provided by the said clause 16 of the said articles of association; nor did they in any manner or at any time act upon the powers given them by the said 16th clause; and so the plaintiffs say that no money became payable by them to the defendant, as such member as aforesaid of the local board of directors of the English and Irish Bank (limited) in Dublin.

The replications to the defences of set-off were similar in substance.

The defendant demurred to the above defences.

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The following were the principal points of demurrer :—That the plaintiffs are bound to pay to the defendant the moneys in the defences respectively mentioned. That the plaintiffs are bound by the deed of the 8th of June 1863 to pay the said moneys to the defendant for his services as director. That it was not a condition precedent to the right of the defendant to remuneration that the directors should set apart any sum. That the moneys in the defences mentioned were, by the operation of the deed of the 8th day of June 1863, allotted and set apart to the defendant as remuneration for his services. That, inasmuch as the directors did not allot any sum as remuneration for the defendant's services, he became entitled, under the articles of association and the deed, to the moneys in the defences mentioned. That, upon the true construction of clause 16th of the articles of association, the local directors in Dublin became and were absolutely entitled to the sum of £1000, and that the directors had no power to alter or diminish the amount of remuneration to be paid to such local directors. That the defendant is entitled to be paid compensation for his services as local director ; and the matters contained in the replications are not sufficient to deprive him of such right.

. *Tandy* (with whom was *Macdonogh*), in support of the demurrer.

The question turns upon the 16th clause of the articles of association. We contend that under this clause the board were not only entitled to, but bound to set apart one-fourth of the fund of £4000 for the remuneration of the Dublin board of directors. The Dublin directors were not to be at the mercy of the London board. The Dublin board were to get the remuneration in any event, though no appropriation might have been made as regards the London board. The terms of the contract between him and the Company under the 12th clause and the deed of covenant was that he was to be remunerated for his services..

Byrne and Douse, contra.

The London and Dublin directors are placed on precisely the same footing. The 16th clause merely deals with the scale of

remuneration. Before any claim could arise under the 12th clause, there must be a setting apart of a fund for that purpose; consequently, there was no performance of a necessary condition precedent.

Tandy replied.

MONAHAN, C. J.

We are of opinion that the demurrer must be overruled. Mr. Gray became a director for better or worse. The directors had power to award to themselves, by way of remuneration, a sum not exceeding £4000; but they have not wished to exercise this power; and Mr. Gray is therefore not entitled to the allowance he seeks for.

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WILLIAM ALLEN, a Minor, by CLARA DELINDA ALLEN,
 his Mother and next friend,

v.

TIMOTHY CARVER.*

(*Queen's Bench.*)

Feb. 3.

Action by lessor against lessee, on covenant to repair. The lease of L excepted "all timber and timber-like trees, now standing and growing thereon," and contained the usual covenant to keep in repair. The summons and plaint set out the covenant, assigning as breaches that defendant suffered said premises, and the fences thereof, to be out of repair, and cut down, and allowed to be cut down from off the said lands, a great number of large and valuable trees, &c. At the trial, defend-

ant's Counsel objected to evidence as to the value of the trees cut down, on the ground that they were excepted out of the demise. Verdict for the plaintiff, £10 for the general neglect, and £60 for the trees cut down.

The Court was now moved to reduce the verdict by the latter sum.

Held, that the cutting down the trees excepted was not an act of waste, and therefore, not a breach of the covenant to repair.

Held also, that on the pleading as framed, the defendant was not called on to raise the question as to the exception of the trees, &c., before the trial.

* Before O'BRIEN, HAYES, and FITZGERALD, JJ.

THE plaintiff's grandfather, William Allen, owner in fee, devised part of the lands of North Liscongill, in the county of Cork, to the defendant, for a term (still unexpired) of years, "saving, "excepting, and always reserving out of this demise, unto the "said William Allen, his heirs, &c., all timber and timber-like "trees now standing or growing thereon, with full liberty of "ingress and egress for the said William Allen, his heirs, &c., "or any other person or persons authorised by him or them, "to enter into or upon said demised premises, and the same "to cut, fell and carry away, with horses, men and carriages, "at his and their will and pleasure, without the hindrance or "interruption of the said Timothy Carver, his executors," &c. Timothy Carver, the lessee, covenanted (*inter alia*) for himself, his executors, &c., that he or they would, "during the continuance "of this demise, preserve, uphold, support, maintain and keep "the said demised premises and every part thereof, and all im- "provements made and to be made thereon, in good and sufficient "order, repair and condition, and at the end of the term hereby "granted, or other sooner determination of this demise," should

and would "so leave and yield up the same unto the said William Allen, his heirs," &c.

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By a subsequent lease, the plaintiff's father, who, in the meantime, by the death of his father intestate, had inherited the property, demised certain other lands called South Liscongill, with a dwelling-house and offices, to the defendant, for a term (still unexpired) of years. That lease contained a like reservation of all timber and timber-like trees, &c.; and a like covenant by the lessee to preserve, uphold, &c.

The plaintiff, by the death of his father intestate, inherited the property; and, being a minor, brought this action by his next friend.

The first paragraph of the plaint set out in terms the lessee's covenant in the first lease, as stated above; and assigned as a breach that the defendant did not preserve, &c., but, on the contrary, did suffer and permit said premises, and the fences thereon, and the houses thereon, to be out of repair and in a ruinous condition, and did cause many of the fences to be thrown down and levelled, and did cut down and allow to be cut down, and did take and carry away, and allow to be taken and carried away from off said premises, a great number of large and valuable trees growing thereon, and which while growing thereon greatly added to the value and appearance of said premises; and did also cut down, take and carry away, and did permit others to cut down, take and carry away from off the said premises, a great quantity of valuable and ornamental shrubs and holly trees that were growing and standing thereon; and did cut and take away, and materially injure, and did permit others to cut and carry away and materially injure a great quantity of oak and other trees growing thereon, and did injury to, and allow injury to be done to same, by cutting and taking the bark from off same, to the damage and injury of the plaintiff, and of plaintiff's estate and reversion of said premises, to the amount of £200. There was a like paragraph founded on the covenant in the second lease.

The defendant pleaded to each paragraph a traverse in terms.

The action was tried before Keogh, J., at the last (1862) Summer

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Assizes for the county of Kerry. The plaintiff gave evidence of the cutting down of a considerable number of timber trees, which it was alleged had been standing on the lands at the respective dates of the two demises, and which were alleged to be within the covenants. Evidence of their value was also tendered. Thereupon, Counsel for the defendant objected to evidence being given in respect to the value of the timber trees, on the ground that those trees were excepted out of the demise, and formed no part of the demised premises, so that their value could not be recovered in this action, which was founded on the covenant alone.

The learned Judge admitted the evidence, but required the jury to assess, in a separate finding, the value (if any) of the timber trees so cut on each holding; and reserved liberty to the defendant to move the Court above to reduce the damages (if any) by the amount assessed as the value of the timber, in case that value was not properly recoverable in this action.

The jury assessed the damages at £70, viz.—£10 for the alleged breaches of covenant in not keeping in repair the demised premises (save the timber); £50 as the value of the timber cut down on the lands demised by the first lease; and £10 as the value of the timber cut down on the lands demised by the second lease.

In the ensuing Michaelmas Term (November 5, 1862), the defendant's Counsel (*Joshua Clarke*) obtained a conditional order to reduce the damages by the amount of £60, pursuant to the leave reserved. Against that conditional order cause was now shown by—

C. R. Barry, and James Murphy.

It was said at the trial that, by a reservation of all timber and timber-like trees, the soil on which those trees grew was also reserved, so that when the trees have been felled the plaintiff is disentitled from recovering their value in an action for a breach of the covenant to keep the demised premises and every part thereof in good and sufficient repair. In support of that proposition, the defendant relied on the following passage in 1 *Fawl. L. & T.*, p. 400: "By the exception of trees out of a lease, so much

"of the soil as affords nutriment to the trees is excepted; and
 "the lessee has a right to the pasturage; but if the exception
 "extend to wood, underwood and coppice, the whole of the soil
 "and surface will be excluded from the demise." That passage
 means that, though by the demise the soil passes generally, there
 is reserved to the landlord a right in the nature of an easement
 to have his trees fed: *Whistler v. Paslow* (a); *Lifford's case* (b).
 Therefore, any act done by the lessee to the land, which in fact
 lessens the nutriment which the soil as demised afforded to the
 trees, is a breach of this covenant: *Legh v. Heald* (c): for the
 trees which are mentioned in the plaint were "improvements
 made or to be made" on the lands, which are merely words of
 description: *Hide v. Paslow* (d). Therefore, the value of the
 trees when felled, as well as compensation for the injury done to
 the premises, may be recovered in this action. Even supposing,
 however, that, strictly speaking, the value of the trees cannot
 be recovered in an action for a breach of this covenant, still the
 defendant has not raised the objection in the proper manner.
 The plaint is to be considered as if the lease, and therefore this
 reservation of the trees, was set out on its face in express words.
 Therefore, this defect was patent on the face of the pleadings,
 and the defendant should have demurred to so much of the plaint
 as claimed damages for the value of the trees, if their value could
 not properly be recovered as damages in a action for a breach
 of the covenant. Perhaps he might still move in arrest of judgment,
 no particular form of action being now necessary. If the facts are
 sufficiently stated, the plaintiff is entitled, *quâcumque viâ*, whether
 in an action for breach of the covenant, in trover or in waste,
 to retain the £60 which the jury have assessed as the value of
 the trees.

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Joshua Clarke and *J. S. Greene*, in support of the conditional
 order, contended that the lessor, when he excepted the trees,
 retained a right to enter upon the land and do everything necessary

(a) Cro. Jac. 487.

(b) 11 Rep. 49, b.

(c) 1 B. & Ad. 622.

(d) Popham, 146.

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for their protection; and that no duty is cast upon the lessee to watch or preserve trees which the lessor had excepted from the demise: 1 *Furl. L. & T.*, p. 663; *Evans v. Evans* (a); *Jenney v. Brooks* (b). The exception in the lease is of "all timber and timber-like trees." But the plaint claims damages for the felling of trees *generally*; and may, therefore, have stated a good cause of action, which the defendant has answered, and yet not include at all the timber and timber-like trees. The words of the plaint would include fruit trees, which are not within the exception: 1 *Furl. L. & T.*, p. 400. Had the plaintiff meant to sue for the value of these timber and timber-like trees, he should have sued the very person who felled them; for those trees, having been excepted, formed no part of the subject-matter of the demise; so that no breach of the covenant could be committed by injuring them. The action of covenant is a substitute for the old writ of waste; but the alleged acts did not amount to waste: *Goodright v. Vivian* (c). The trees were "excepted," not "reserved:" *Doe v. Lock* (d).

James Murphy, in reply, admitted that the trees were not part of the demised premises; but maintained that they had been growing thereon—*Legh v. Heald* (e),— in such a sense that the lessee, by felling them or allowing them to be felled, had committed a breach of the covenant: *Doe v. Price* (f).

O'BRIEN, J.

In this case we are all opinion that the conditional order obtained by defendant should be made absolute; and that, accordingly, the verdict should be reduced from £70 to £10, the difference (£60) being the sum which was included in the verdict as the value of the timber cut on the demised premises during defendant's tenancy. It is true that, according to the case of *Legh v. Heald* (e), the exception contained in the leases now before us, of "timber and timber-like trees," did not include the soil

(a) 2 Camp. 496.

(c) 8 East. 189.

(e) 1 B. & Ad. 622.

(b) 6 Q. B. 323.

(d) 2 Ad. & EL. 705.

(f) 8 C. B. 893.

upon which such timber, &c., grew; but that, notwithstanding the exception, said soil passed to defendant, as part of the demised premises; the landlord retaining, under said exception, a right of nutriment out of said soil for said timber and trees.

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Admitting, however, that the soil on which the timber and soil grew was part of the premises demised by the lease, the question still remains, whether the cutting of such timber trees, which were expressly excepted out of the lease, is a breach of defendant's covenant to keep the *demised premises* in repair. And upon this question it appears to me that the case of *Goodright v. Vivian* (a) is a distinct authority in defendant's favor. In that case also, the lease upon which the ejectment was brought contained an exception of all trees of oak, &c., growing on the demised premises; and there was a proviso in the lease, that if the lessee should commit any waste in or upon *the demised premises*, it should be lawful for the lessor to re-enter. It appeared that the defendant, who derived under that lease, had cut and sold several of said trees, and the ejectment was brought on the ground that the cutting of said trees was an act of waste, within the terms of said proviso for re-entry, and that a forfeiture had been thereby incurred. But the Court, without hearing defendant's Counsel, held that the ejectment was not maintainable; that waste could only be committed of the thing demised; and that, as the trees were excepted out of the demise, no waste could be committed of them, and that consequently no forfeiture within the terms of the proviso was incurred by cutting them down. I think the principle of that decision is applicable to the case now before us; and that, as the cutting of trees excepted out of the lease would not be an act of *waste* on the demised premises, it follows that it would not be a breach of the covenant to keep the demised premises in repair. The exception of trees out of a lease relieves the tenant from some liabilities respecting them, which he would incur if they were not so excepted. With respect to the case of *Rogers v. Price* (b), on which (although the decision in it was in the tenant's favor) plaintiff's Counsel relied as showing the opinion of the Court that a lessee might be liable

(a) 8 East. 190.

(b) 8 C. B. 894.

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for the cutting of trees, although they were excepted from the lease, it will be seen, by referring to it, that the lessee's covenant against waste expressly referred to the cutting of trees as constituting an act of waste; and that, accordingly, the opinion expressed by the Court on the effect of that covenant is not applicable to the case now before us.

Plaintiff's Counsel have further contended, that it was not competent for defendant to have raised this question at the trial, not having done so on the previous pleadings. We think, however, that upon the pleadings as framed, defendant was not precluded from raising the question at the trial.

HAYES, J.

With most of the positions advanced by the plaintiff's Counsel I do not quarrel, for I go with them to this extent, that, according to the true construction of this covenant, the timber and timber-like trees* were undoubtedly excepted from the demise, and were the property of the landlord; and that every particle of the earth in which they grew was the subject of demise to the tenant. This being so, there was, nevertheless, reserved to the landlord a right of taking from the soil nutriment for his trees, such as was necessary for their growth and sustainment. All that was true; and the trees being the property of one man, and the soil in which they grew being the property of another, I do not think that, on the fair reading of this lease, it ever was intended to throw on the tenant the duty of taking care of the landlord's trees. The landlord seems to have carefully kept that to himself, and has reserved a power to go in upon the land to cut the timber and timber-like trees, &c.; no duty was cast upon the tenant to watch or preserve them. The plaintiff says that the defendant covenanted to keep the demised premises, and all improvements made and to be made thereon, in good and sufficient order, repair and condition; and he contends, that growing trees form a part of the improvements made thereon. But in assigning the breach he does not adopt the language of that covenant. He says, that

* As to what trees are *timber*, see 15 & 16 G. 3, c. 26, s. 3.

the defendant did cut down and allow to be cut down, and did take and carry away and allow to be taken and carried away from off said premises, a great number of large and valuable trees growing thereon. Now, these words may be satisfied, without including the timber and timber-like trees that were excepted, as it is probable there are growing upon the premises trees of other descriptions, as fruit trees and many ornamental trees, so that timber and timber-like trees are not within the scope of the covenant. We must take it that the whole amount given in damages by the jury, *ultra* the sum of £10, is for the value of the timber and timber-like trees, for which the defendant is not responsible according to the fair and true construction of this lease; that value is to be deducted, and the verdict reduced to £10.

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FITZGERALD, J.

I also am of opinion that the lessee has not covenanted to keep in good and sufficient order, repair and condition, the trees which the landlord specially excepted out of the demise and kept to himself.

THE QUEEN, at the prosecution of JAMES GORDON and
MARTIN NAUGHTEN,

v.

WILLIAM RITSON, Collector of Inland Revenue for the
Galway Excise Collection.*

M. T. 1862.

Nov. 4.

MANDAMUS.—The prosecutors stated in a joint affidavit the following material facts:—That each of them had been duly appointed, and still continued to act as an officer for the service of civil-

This was an application for a *mandamus* to compel the Inland Revenue to pay certain *Held*, that the same rights

salaries to process-servers appointed by the Recorder of Galway. writ should go, inasmuch as, under the Civil-bill Act, Recorders had as to the appointment of process-servers as Assistant-Barristers.

* Before the Full Court.

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bill processes in the Court of Quarter Sessions, holden before the Recorder of the county of the town of Galway; and each of them obtained a certificate which, being signed by the Recorder, and bearing date the 20th of March 1861, declared that each of them had, during the previous quarter of a year, discharged to the satisfaction of the Recorder the duties of the office of process-server, and was entitled to be paid the sum of £2. 10s. Od., being for one quarter's salary. Each of the prosecutors duly presented his certificate to Mr. Ritson, who refused to pay the money. The prosecutors then submitted that each of them is entitled, under the certificate of the Recorder, to receive from the collector of Inland Revenue for the Galway Excise collection, a salary of £10 per annum, and to obtain a writ of *mandamus* to compel Mr. Ritson to pay said salaries respectively.

Accordingly, in Trinity Term 1862, the Court granted a conditional order for the writ prayed for. Mr. Ritson filed as cause, a short affidavit to the effect that he refused to pay the salaries, because he believed such payments would be illegal; and that his refusal was made under the directions of the Board of Inland Revenue.

Macdonogh and *Jebb*, on behalf of the Attorney-General, showed cause.

The 7 G. 4, c. 36, was the first Act which gave to process-servers who had been appointed by an Assistant-Barrister the sole right to serve processes. Its third section conferred an annual salary of £10, payable quarterly, by the district collector of excise, on each of such process-servers, who should produce to the collector a certificate signed by the Assistant-Barrister, stating the amount to be paid, and that the payee had during the preceding three months discharged his duty in a satisfactory manner. That Act related solely to Assistant-Barristers for counties, and had nothing to do with Recorders of boroughs. The next Act which is in any wise conversant with Recorders is the 3 & 4 Vic., c. 108, ss. 131 and 194, but it does not give to process-servers any right to a fixed salary, though its 194th section provides that the Town

council shall fix a table of fees, which are to be approved of by the Court of Queen's Bench, for the officers of the Recorder's Court; and process-servers appointed by the Recorder are officers of his Court for the execution of process. If, therefore, there exists the right now claimed to a fixed annual salary of £10, payable out of the public revenue, that right must have been given by the 14 & 15 *Vic.*, c. 57,—sections 15 and 17 of which are re-enactments of the provisions in the 7 *G.* 4, c. 36. But these two sections never mention Recorders. Section 34 gives to the Assistant-Barrister for the county of Galway a civil-bill jurisdiction concurrent with that of the Recorder in the county of the town of Galway. Therefore, the Assistant-Barrister for the county of Galway is expressly empowered to appoint process-servers for the county of the town of Galway; and the public revenue may, if this writ is granted, be burdened with the payment of salaries to two sets of process-servers for one and the same place. Section 159 only assimilates "all proceedings by way of civil-bill" before any Recorder, with two exceptions, to these before Assistant-Barristers. That section designates process-servers as "officers of the Court." The question really turns upon the construction of section 162. But that is only a glossary to explain the words actually used in the Act, and not containing such express and unambiguous provisions as would authorise the Court to increase the public taxation, by imposing on the board of Inland Revenue the duty of paying these salaries. Besides, there may have been a good reason why the Legislature gave to each process-server in counties, in addition to his fees, a fixed annual salary; for process-servers in counties have occasionally to travel considerable distances; but no such reason applies to boroughs, wherein the appointed fees constitute a sufficient remuneration.

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P. J. Blake, in support of the conditional order.

No argument can now be drawn from the 7 *G.* 4, c. 36, because it has been wholly repealed by the 14 & 15 *Vic.*, c. 57. The 3 & 4 *Vic.*, c. 108, s. 177, gives the Recorders of boroughs power to appoint process-servers. The 14 & 15 *Vic.*, c. 57, s. 162, enacts

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Queen's Bench save as therein excepted, unless there be in the context something
 THE QUEEN repugnant to, or inconsistent with such a construction. Substituting
 v. "Recorder" for "Assistant-Barrister," in sections 15 and 17, the
 RITSON. prosecutor's right to this writ is manifest. Although, under section 34, two different sets of process-servers may be appointed for one and the same place, yet they are officers of two distinct Courts, and have to perform different duties.

Jebb was heard in reply.

Cur. adv. vult.

LEFROY, C. J.

This case comes before the Court upon a motion to show cause against a conditional order for a writ of *mandamus* directed to the Commissioners of Inland Revenue, calling upon them to pay a salary of £10 per annum to each of the prosecutors, who are process-servers appointed by the Recorder of the county of the town of Galway. The decision of the case turns upon the Recorder's right to make the appointments under which the salary is claimed. If he has the right, the prosecutors are entitled to maintain their conditional order; but, if he has not that right, the order must be discharged.

We have all come, though perhaps it may be through the medium of different premises, to the conclusion that the Recorder has the right to make the appointments. The question turns mainly upon the construction of the Civil-bill Act (14 & 15 Vic., c. 57), which, after repealing a variety of Acts, sums up what were to be in future the regulations of the Civil-bill Courts upon different subjects, and, amongst others, upon the subject of the appointment of process-servers. One of those antecedent Acts (7 G. 4, c. 36, s. 3) gave authority to the Assistant-Barristers of Civil-bill Courts to make the appointment of process-servers, and to appoint to each of them a salary of £10 per annum, with an enactment that, upon the production of a certificate signed by the Assistant-Barrister, specifying the amount, and stating that the process-server had during the preceding three months discharged his duties to the

satisfaction of the Assistant-Barrister, the collector of excise for the district should pay the process-server that salary. The Civil-bill Act which is now in force (14 & 15 Vic., c. 57) consists in part of a re-enactment of many of the enactments in the repealed Act; and, amongst others, confirms anew the jurisdiction which had been by a subsequent Act given to the Recorders of certain towns (including Dublin and Cork), and giving them a civil-bill jurisdiction in those towns, of which Galway is one.

There are several sections in the existing Civil-bill Act upon which strong reliance was placed, as affording a fair legitimate inference that the Legislature intended by this Act to give to the Recorders a similar jurisdiction and authority to that which had been given to the Assistant-Barristers. I confess that, so long as the argument was rested on inference and implication, it was, as I said at the time, thrown away upon me; for the principle of *law*, as well as of construction, is so well settled that nothing but express, clear, and unambiguous words in a statute can charge the public revenue—that I could not yield to any argument drawn from inference merely. I had then made up my mind, and left Court under the impression that there were not to be found in the Civil-bill Act words which deserved that description, and would sanction the making of these appointments by the Recorder. But, upon looking very minutely through the Act, and almost word by word and line by line—although I think that there was some foundation for the argument drawn from implication from the other sections, that there arose from them an inference of an intention by the Legislature to give this authority to the Recorders likewise,—yet, to every such argument from mere implication, it struck me as a conclusive answer that the original Act, from the language of which it was sought to infer an intention to give this authority to appoint process-servers to the Recorders, was couched in the most clear, express, explicit, and unambiguous language, which conferred the right to appoint on Assistant-Barristers only; and that, when that Act was repealed by the general repealing section in the Civil-bill Act, the provision with respect to *Assistant-Barristers* having the right to appoint

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process-servers was re-enacted *ipsisssimis terminis*, it occurred to me to ask if the Legislature, in order to give that right to the Assistant-Barristers, re-enacted in the present Civil-bill Act the provision of the former Act in express words, why should we suppose that the Legislature intended to give by implication any power to the Recorders, or to leave anything to mere inference as to them, when that very right is given in express terms to the Assistant-Barristers, omitting Recorders? If ever the rule of construction applied (*expressio unius est exclusio alterius*), it must do so here—if the case rested here. But, when I came with my Brethren to look into the case, I confess it appeared to me that, in almost the very last lines of the Civil-bill Act, there are words which must of necessity be held to include the Recorders; for they can include nothing else if they do not include the right to make these appointments. The interpretation clause (sec. 162) enacts, in general words, that “The expression ‘Assistant-Barrister’ or ‘Assistant-Barristers’ shall extend to and include the “Chairman of the Sessions of the Peace of the county of Dublin, “and the Recorder of the city of Dublin, and the borough of Cork, “and the several Recorders herein mentioned, in civil-bill proceedings, save and except so far as relates to the appointment, “salary, retiring pension, and continuance in office of the said “Recorders, or so far as it is by this Act in other respects “specially provided.” This provision by express words puts the Recorders of all other places, but those of Dublin and Cork, who have a civil-bill jurisdiction, on the same footing with Assistant-Barristers as to the appointment of process-servers, and every other matters, save only as to those excepted; and it does so by words as unambiguous as words can be, namely, that in every instance in which the phrase “Assistant-Barrister” is used, it shall, except in the excepted cases, of which this is not one, include “Recorders.” I therefore think that, according to the legal rules of construction, the phrase “Assistant-Barrister,” in the 15th section, must of necessity include “Recorders.” Upon that ground I am of opinion that the Recorder is entitled to make the appointment.

The 159th section, which was greatly relied upon during the argument, has nothing to do with this question. That section relates to the former course of proceeding, for which the new course is substituted by that section.

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I have stated shortly the reasons why I have come to this conclusion, and offer them as my own only.

O'BRIEN, J., concurred in the judgment of the Court.

HAYES, J.

I am very glad that we are enabled by our unanimous judgment to relieve the fiscal scruples of the excise-officers, and that our judgment rests upon a solid foundation, viz., the express words of the statute—on words as express as can well be. The 14 & 15 *Vic.*, c. 57, s. 15, enables the person therein named—that is, the person called “Assistant-Barrister”—to appoint process-servers. The 17th section directs that the process-servers so appointed by that individual “shall receive a salary of ten pounds a-year” each. Who then is this person who is called an Assistant-Barrister? What is the thing signified of which that word is the sign? Turn to the 162nd section, which tells us that, in the construction of the Act, the expression “Assistant-Barrister” shall include . . . “the several “Recorders herein mentioned, in civil-bill proceedings, “unless there be something in the context or provision repugnant to “or inconsistent with that construction.” Is there then in the context anything repugnant to or inconsistent with this interpretation? It would be repugnant to common sense and justice if the interpretation were otherwise. Before the present Civil-bill Act was passed, the Recorders were invested with certain powers, and authorised to appoint process-servers; and it was referred to this Court to settle adequate fees for them. But then comes the Act now in force, which upsets all that, and enacts that no fee whatsoever shall under any pretence be taken, save and except the sixpenny and shilling fees mentioned therein. See then the duties: the process-server has to serve the processes on perhaps twenty different persons in a case; he has to keep a book recording the fact, manner

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and particulars of every service, with such accuracy that in the event of his death the book may stand in his stead as evidence; and, besides all this, he must attend during the whole of every sitting of the Civil-bill Court. The performance of all these duties would I think be rather underpaid by sixpence or a shilling in each case. Our decision is but carrying out the principle and policy of the Civil-bill Act, which, while providing an adequate remuneration for the process-servers, takes care that they shall not be altogether dependent on fees; but, by giving them a fixed salary, makes them officers of the Court in which they practise, and brings them more directly and effectually under its control. We have therefore not only the letter and spirit of the Act, but reason and good sense, in support of our decision.

FITZGERALD, J.

The Commissioners of Excise do not resist this application in the ordinary sense. They have come in very properly to ask from the Court an interpretation of an Act which is by no means free from doubt. The question is one of no small difficulty; but at the same time, I concur in the result at which the Court has arrived, that the Recorder of a borough, who exercises civil-bill jurisdiction is authorised to appoint civil-bill process-servers, who upon appointment are entitled to be paid, in common with the other process-servers appointed under the Act, the salary which the Act prescribes. Concurring as I do in opinion with the other Members of the Court, it is unnecessary for me to state in detail my reasons, but I desire to observe, that I am very much influenced by the concluding provision of the 159th section which has been adverted to. "Provided always, that nothing herein contained shall be construed to affect the manner or times of holding the Courts of such Recorders for the hearing of such civil-bill proceedings, or to abridge any existing power of such respective Recorders to appoint the proper officers of such Courts for the service or execution of the process of the same; and if any doubt shall arise in the application of this Act, as to what officers of such Courts shall correspond to those named in this Act for the

"service or execution of process, it shall be lawful for such Courts
"to determine the same." That appears to me to be a legislative
declaration that there shall be in every Recorder's Court in which
civil-bill jurisdiction is exercised, officers standing in the same
position as the process-servers in the Chairman's Court, and whose
exclusive right and duty it shall be to serve the processes, to attend
the Court at stated times, and to keep a book, which is open to
the public, and to enter therein the time and manner of the service
of the processes; and which book, in case of the death of the
process-server, becomes one of the records of the Court, and evi-
dence for all parties. Taking into account the general language
of the 159th section and the mandatory terms of the glossary, and
applying them to the 17th section, I think that the writ ought
to go. Very little light can be derived from the previous enact-
ments. The general scope of the 14 & 15 Vic., c. 57, was to
give increased jurisdiction and efficiency to these Inferior Courts
in which the civil-bill jurisdiction previously existed; and amongst
other matters of procedure intended for the protection of the public,
was one to provide in all of them a person who alone should be
entrusted with the service of the processes of the Court, and upon
whom onerous duties were imposed.

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 RAILWAY COMPANY.*

Jan. 19, 20.

Action for not delivering cattle within a reasonable time. B booked cattle from D. to L. without inquiring of the Company as to the hours of the trains. The cattle arrived at R., some distance from L., in due course at 12.30 a.m., but no train left for L. till 10 a.m., when they were forwarded. On a previous occasion B had booked cattle for L., which were forwarded from R. at 3 a.m. This train had been discontinued without any public announcement.

The Company never published time-tables of their goods or cattle trains, their arrangements for those trains being contained in a book only used by the Company's servants, and which contained the alteration in question. At the trial, the Judge told the jury that the Company were bound to give the public notice of the change of hours in the departure of their trains.

Held, a misdirection, that the previous dealing, even though coupled with the absence of time-tables, did not make the old arrangement as to the starting of the train from R. an element of the contract.

SUMMONS and *plaint*, first paragraph:—That the defendants are common carriers of horses for hire from Dublin to Lincoln, and that the plaintiff delivered to the defendants, as such common carriers, and the defendants, as such common carriers, received from the plaintiff divers, to wit, fifteen, horses, to be safely and securely carried by the defendants for the plaintiff from Dublin* to Lincoln, within a reasonable time, and there safely and securely and within such reasonable time delivered for the plaintiff, for reward. Yet the defendants made default, and did not carry or deliver said horses within such reasonable time; but, on the contrary, delayed and detained same for a long and unreasonable time, whereby said horses were much injured and deteriorated in value, and whereby plaintiff was unable by reason of such injury and deterioration to sell same in a market where he otherwise could and would have sold same, and whereby plaintiff lost large profits which he would otherwise have made by the sale of said horses.

The second paragraph differed from the first only in alleging that the injury and deterioration happened "through the negligence and improper conduct" of the defendants.

First defence to the first paragraph:—That the defendants received the horses therein mentioned to be carried from Dublin to Lincoln as alleged, subject to a certain contract made between

* Before the Full Court.

them and the plaintiff, that the said horses should, according to such ordinary course of business on the said railway, arrive at Retford, being a station on defendants' line of railway between Dublin and Lincoln, at the hour of 12.35 on the morning of the 18th day of April last, being Good Friday; and should according to such ordinary course of business be thence forwarded to Lincoln by the first morning train which, in the ordinary course of business, should leave Retford aforesaid after the said hour on said morning; and defendants say that said horses did arrive at Retford at said hour of 12.35 on said morning of Good Friday, and were thence forwarded to Lincoln by the first train, which left Retford aforesaid at the hour of 10.20 on said morning, and which was the first morning train which, in the ordinary course of business, should or did leave Retford on said morning of Good Friday, after the said horses had arrived as aforesaid. And defendants say that said horses were delayed and detained for the period aforesaid, from said hour of 12.35 until 10.20, as they lawfully might for the cause aforesaid, which is the delay and detainer complained of by the plaintiff; and that, with the exception of that delay, the said horses were not delayed or detained by the defendants as alleged.

The third defence, which also was pleaded to the first paragraph, was that the defendants did convey and deliver the horses to the plaintiff at Lincoln within a reasonable time.

The second, fourth and sixth defences, all of which were pleaded to both paragraphs, traversed respectively the averments "that the defendants received the horses for the purposes and on the terms" alleged; that "they did not safely and securely carry and deliver" the horses; and the alleged injury and deterioration.

The fifth defence, which was pleaded only to the second paragraph, traversed the averment that the injury and deterioration of the horses were caused through the negligence and improper conduct of the defendants as alleged.

The action was tried before the LORD CHIEF JUSTICE at Naas, during the Summer Assizes of 1862.

For the plaintiff, evidence was given that his son had, on the 16th of April 1862, booked in Dublin fifteen untrained colts,

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through to Lincoln, but got no ticket nor docket then. On the following day, in Liverpool, he *paid* for their carriage from Dublin to Lincoln. At Liverpool he got an invoice headed thus:—"City of Dublin Steam Packet Company, and London and North Western Railway Company;" and also signed a ticket headed "London and North Western Railway Company;" which contained (*inter alia*) this agreement: "I hereby declare that the value of the fifteen horses this day delivered by me to the London and North Western Railway Company, for carriage in cattle waggons by luggage train, does not exceed £10 per horse; and, in consideration of the rate charged for conveyance of such horses, I hereby agree that the same are to be carried entirely at the owner's risk." The horses were, by his directions, forwarded from Liverpool on that evening in open waggons, which arrived at Retford at 12.35 a.m., on the 18th of April, and were then placed on a siding, where they remained until 10.20 a.m., at which hour they were sent on by a luggage train to Lincoln, where they arrived about noon, when it was found that several of the horses had capped hocks and colds, and had been otherwise injured. It likewise appeared in evidence that, on one occasion in the year 1861, plaintiff had sent by the same route horses which arrived at Retford at 12.35 a.m., but were sent forward at about 3 a.m., and reached Lincoln early in the morning.

The LORD CHIEF JUSTICE refused a nonsuit, for which the defendants applied, on the ground that they were only sued as common carriers of horses; which averment was traversed, and was disproved by the agreement which the plaintiff signed at Liverpool.

Thereupon the defendants proved that the horses had been forwarded from Liverpool and Retford by the first cattle train which, in the ordinary course of business, left those stations respectively after the arrival there of the horses; that the 3 a.m. train from Retford had been discontinued from and after the 31st of March preceding; and that the plaintiff could have sent the horses on to Lincoln by an express train, which however he refused to take. Proof was also given that *Bradshaw's Railway Guide* is

not an authorised book, and that no time-table for cattle or luggage trains had ever been published by the defendants, who gave in evidence a printed book kept for the use of their own servants, and containing the times of the arrival and departure of such trains. From this book it appeared that the horses had been forwarded from Retford by the first cattle train after their arrival there, and that on Good Friday trains ran only as on Sundays.

The LORD CHIEF JUSTICE, when charging the jury, said that they were to consider whether the plaintiff had not reasonable grounds to expect that his horses would be delivered as formerly, by the 3 a.m. train from Retford, no notice of its discontinuance having been given at the Dublin office, although the public were entitled to such notice.

Subsequently, in reply to a question asked by the jury, his Lordship said that the Company was bound to give the public notice of the change of time in the departure of their trains.

The defendants' Counsel required his Lordship to tell the jury that there was no evidence of negligence on the part of the Company, unless delay from 12.35 a.m. to 10.20 a.m. was to be so considered; but that such delay, if it occurred according to the ordinary course of their business, did not constitute negligence, or improper conduct, or breach of a duty to deliver in a reasonable time.

Secondly; that the neglect of the Company to give notice to the public of the change of hours or times of starting of their trains did not constitute such negligence, improper conduct, or breach of duty; nor were they bound to give such notice. To this application his Lordship declined to accede.

In Michaelmas Term 1862 (November 4th), *G. Battersby*, on behalf of the defendants, obtained a conditional order to set aside the verdict, and for a new trial, on the grounds of misdirection, and that the verdict was against evidence, and the weight of evidence. Against that conditional order, cause was now (January 19, 20, 1863) shown by—

Sergeant *Armstrong* and *Palles*, who contended that the horses had not been forwarded to Lincoln within a reasonable time, as the

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discontinuance of the 3 a.m. train from Retford to Lincoln was so recent that the Company could not be said to have sent the horses on by the first train in their ordinary course of business, and that notice of the discontinuance of that train should have been given to the public, or at all events to the plaintiff, at the Dublin office of the Company.

Sergeant *Sullivan* and *G. Battersby*, in support of the conditional order.

The plaintiff cannot rely on a contract (if any) made in Dublin, for there is no evidence of it. Moreover, if any contract was made there, it was made with the Dublin Steam Packet Company, to whom the horses were delivered—*Directors of the Bristol and Exeter Railway Company v. Collins (a)*,—so that the plaintiff should have sued them instead of the defendants. The contract with the defendants was made in Liverpool; and they undertook to carry the horses only on the terms embodied in the ticket which the plaintiff signed there: *Walker v. York and North Midland Railway Company (b)*; *York, Newcastle, and Berwick Railway Company appellant, Crispe respondent (c)*; *Hughes v. Great Western Railway Company (d)*; *Pardington v. South Wales Railway Company (e)*; *Austin v. Manchester, Sheffield, and Lincolnshire Railway Company (f)*. No doubt, the term that the horses were to be carried entirely at the owner's risk was unreasonable (*g*), according to the decision in *M'Manus v. Lancashire and Yorkshire Railway Company (h)*, which *this* Court cannot overrule. But the authority of that decision has been shaken to the very root in *Harrison v. London, Brighton, and South Coast Railway Company (i)*. Though that term of the contract must therefore in *this* Court be considered unreasonable, the remainder of the contract is good; and therefore the contract is not a nullity:

(a) 7 H. of L. Cas. 194.

(b) 2 Ell. & Bl. 751.

(c) 14 C. B. 527.

(d) 14 C. B. 637.

(e) 1 H. & N. 392.

(f) 16 Q. B. 600.

(g) See, as to such conditions, *Lloyd v. Waterford and Limerick Railway Co.* (*supra*, p. 37).

(h) 4 H. & N. 327.

(i) 31 Law Jour., N. S., Q. B. 113.

McCance v. London and North Western Railway Company (a). H. T. 1863. *Queen's Bench*
 A man who delivers to a railway company goods to be carried, *BOLLANDS*
 and enters into a contract with them which the duty of common *v.*
 carriers would have supported, must sue on that special contract, *MAN-*
 and cannot rely on their duty as common carriers: *Hughes v. CHESTER,*
Great Western Railway Company (b); *White v. Great Western ETC.,*
Railway Company (c). *RAILWAY.*
 Unless then the plaintiff grounds his case
 on the contract which he signed in Liverpool, he cannot support
 the case at all, for he never made any other contract with the
 defendants, so far as appears by the evidence; and railway com-
 panies are not common carriers of cattle: *Johnson v. Midland*
Railway Company (d); *Ch. & Tem. on Carriers*, pp. 15, 16.—
 [FITZGERALD, J. The defences do not seem to deny the allegation
 that the horses were received by the defendants in the character of
 common carriers of horses.]—There is a denial that the horses were
 received on the terms alleged; that is, a traverse of the character.
 That railway companies are not common carriers of cattle appears
 from this, that it became necessary to pass the Railway and Canal
 Traffic Act (16 & 17 Vic., c. 31) *because* they had not that charac-
 ter. Section 3 of that Act gives this Court power, on a proper
 application being made, to compel railway companies to afford the
 public reasonable facilities for traffic. They may therefore, without
 giving any notice of their intention, make any alterations which
 they please in their traffic, provided only that such alterations are
 reasonable. The 3 a.m. train from Retford to Lincoln had been
 discontinued upwards of a fortnight previous to the 18th of April,
 so that these horses were sent forward within a reasonable time,
 and according to the ordinary course of traffic on the defendants'
 railway. Besides, it is the duty of the public to ascertain by inquiry
 the times of departure or arrival of the trains. The plaintiff made
 no such inquiry; and the Company never made any contract with
 the public in respect to the times of departure of the luggage trains,
 concerning which no time-tables had ever been published. The jury
 were therefore misdirected.

(a) 31 Law Jour., N. S., Exch. 65.

(b) 14 C. B. 637.

(c) 2 C. B., N. S., 7.

(d) 4 Exch. Rep. 372.

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If the defendants had intended to raise any objection touching the contract not having been made with them, they should have raised at the trial a substantive question for the jury, what was the contract on which the horses were received?—*Anderson v. Chester and Holyhead Railway Company (a)*; so that they are now precluded from entering on this point, which is, at most, one of special pleading. Had the objection been raised at the trial, the plaintiff might have been amended by adding a count upon a contract to carry the horses within a reasonable time. Granting however that a contract was entered into at Liverpool, still the defendants are liable as common carriers, for they have been sued in, but have not traversed, that character. Railway companies are common carriers of dogs at all events: *Harrison v. London, Brighton, and South Coast Railway Company (b)*. The defendants, if they meant to evade the liability attaching to common carriers, should have limited their responsibility: *Palmer v. Grand Junction Railway Company (c)*. The contract did not remain open until the ticket was signed at Liverpool; for the defendants, having begun the journey, were bound to carry the horses to the end of it, even though a difference had arisen at Liverpool. There was no valid variation at Liverpool of the contract made at Dublin, for the defendants were not parties to that variation, which was made with the London and North Western Railway Company only; so that the plaintiff would have been nonsuited if he had sued the defendants on that contract. The defendants say that they received the horses on the conditions mentioned in that contract. But every condition in it is unreasonable and void: *McCance v. London and North Western Railway Company (d)*; so that the defendants are properly sued in their character as common carriers. It would have been wrong to exclude from the consideration of the jury the previous dealings between the parties: *Wren v. Eastern Counties Railway Company (e)*. The contract was not to be regulated by the ordi-

(a) 4 Ir. Com. Law Rep. 435.

(b) 31 Law Jour., N. S., Q. B. 113.

(c) 4 M. & W. 768.

(d) 31 Law Jour., N. S., Exch. 65.

(e) 1 Law Times, N. S., 5.

nary course of business of the defendants at the time when the horses were received; because, as they had not published any time-tables, the plaintiff could not know that course of business except from personal experience. The defendants are bound to carry according to the profession which they make to the public: *Johnson v. Midland Railway Company* (a); *Denton v. Great Northern Railway Company* (b). This profession to the public does not cease until a public notice of an alteration has been given, or the dealings under the altered regulations have gone on for such a length of time as amounts to a reasonable notice.

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LEFROY, C. J.

In this case we are all of opinion that there should be a new trial. There is a very important abstract question involved in the case; and the jury may have been—and I must say that I apprehend they were—influenced in finding their verdict by the view which they took upon that question, namely, whether the defendants in this instance were bound to have apprised the plaintiff of the change which they had made in the hour of departure of the early train from Retford. The jury thus took it for granted that the plaintiff had contracted with the defendants either as common carriers, or in a manner which would oblige them to deliver the horses at Lincoln within a reasonable time. The jury, I think, may have been, and probably were, misled by the notion that the defendants having, some time before the date of the transaction out of which this case has arisen, changed the course of proceeding for delivery of goods, and not having apprised the plaintiff of that change, and that change having been the cause of the delay in the delivery of the horses, which accordingly were delivered in Lincoln at so late a period of the day as to defeat the object which the plaintiff had in sending them to be sold at the fair at Lincoln on that morning. I quite concur with my Brothers that, the jury having asked the question whether the Company were bound to give notice of the change made with respect to the time at which the train started from Retford, and not having been distinctly apprised that the Company were at

(a) 4 Exch. 367.

(b) 5 Ell. & Bl. 860.

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liberty to make that change—it having been made some time before, and not just before the 17th of April,—without giving any intimation that it had been made, I think that the jury, if they gave their verdict under the influence of any such impression or notion, gave it upon a wrong ground; and that the jury, instead of having been left to take into their consideration the fact that the Company had not apprised the plaintiff of the change, and having been left to deal with the matter at large as to the change which had been made, I imagine mainly proceeded upon that ground in finding their verdict. That ground not being sustainable, I think that there should be a new trial, for the purpose of putting more distinctly to the jury that it was the duty of the plaintiff, to whom it was an important object that his horses should be delivered at Lincoln at a particular time, to have ascertained whether the Company would undertake, or whether their system of traffic continued to be such as would enable them to undertake, to deliver the horses at that particular time? The Company had changed their practice for a considerable time before; and therefore they may have imagined that the public had been apprised of the change. At all events it was the duty of the plaintiff, to whom it was an object to have his horses delivered at Lincoln at a particular time, to have made the inquiry. If there was any default, it was on the part of the plaintiff, and not of the Company. The existing system of traffic at the time disabled them from doing it. They were not in default; and, if the necessities of their traffic made it necessary for them to change the system, they had a right to do so. In fact therefore there was no default on their part; and the plaintiff, not having ascertained whether the Company would undertake to deliver his horses at Lincoln by a given time, has been himself the occasion of the damage which he has suffered. Therefore there ought to be a new trial, for the purpose of having the case delivered from even the unjust suspicion of the verdict having been given under a mistaken impression, and being based upon a false ground.

O'BRIEN, J.

I am also of opinion that the verdict obtained by plaintiff should be set aside, and a new trial granted.

A portion of the argument has been directed to the question whether, having regard to the pleadings and the evidence given at the trial, we should hold that defendants received plaintiff's horses as "*common carriers*," and are liable in that character. I do not however think it necessary at present to decide that question, because, in my opinion, there are other grounds on which it is clear that the verdict cannot be sustained.

It appeared by the evidence that on some former occasions (previous to March 1862), plaintiff's horses had been conveyed by defendants from Manchester to Retford by a goods or cattle train, which arrived there about half-past twelve at night, and had been conveyed from thence to Lincoln by an early cattle train, which left Retford about three in the morning, but that such early cattle train had been discontinued from the 1st of March 1862, from which period the first cattle train that started from Retford to Lincoln, after the arrival at Retford of the Manchester cattle train at half-past twelve at night, was one which started at 10.20 a.m., about seven hours later than the former early train. Accordingly, upon the occasion in question, plaintiff's horses having arrived from Manchester at Retford about half-past twelve at night, were delayed there until 10.20 a.m., when they were forwarded to Lincoln; and plaintiff brought his action for the delay occasioned by their not having been forwarded as formerly. The contract on which plaintiff relies in the summons and plaint was a contract that plaintiff's horses should, "*within a reasonable time*," be safely carried to Lincoln, and securely delivered to him there; and plaintiff's Counsel contend that, in considering whether there was a breach of that contract or not, the reasonableness of the time within which the horses were in fact carried to Lincoln, on the occasion in question, was to be ascertained by reference to the time within which plaintiff's horses had been carried there by the Company on former occasions. Upon this question my LORD CHIEF JUSTICE left it to the jury to consider whether the plaintiff had not reasonable grounds for expecting that his horses should be delivered as formerly by a three o'clock morning train from Retford; but he subsequently told the

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jury that the Company were bound to give notice to the public of the change of time of the train. Acting on that direction, the jury would of course conclude that *the reasonable time* within which, according to the contract, plaintiff's horses were to be carried to and delivered at Lincoln, was the time in which his other horses had been carried and delivered on previous occasions, viz., by the three o'clock morning train; and that, accordingly, plaintiff was entitled to a verdict, inasmuch as such contract had not been performed. I am however of opinion that such direction was erroneous, and that there is no authority for holding that, under the circumstances of this case, there was any obligation on the part of the Company to give the notice, or that, by reason of their not having done so, they were liable for not having carried plaintiff's horses as they had previously done.

There have been cases in which railway companies were held liable for not having had *passenger trains* running at particular hours, agreeably to the statements in the time-tables then published and circulated by them for the information of the public, and where it appeared that such trains had been discontinued without any corresponding alteration having been made in the public time-tables. One of those cases was that of *Denton v. The Great Northern Railway Company* (a), referred to in the argument. In that case the time-tables for the current month (which were published by the company and posted in their office, and one of which plaintiff had in his possession) stated the departure of a train from Peterborough to Hull at five o'clock p.m. Acting on the faith of that statement, plaintiff went by the company's train from London to Peterborough, intending to go from thence to Hull by the five o'clock a.m. train; it appeared however that no such train started: he was accordingly detained for several hours, and brought his action for the damages he sustained by reason of the delay in his arrival at Hull. It appeared that the five o'clock train had in fact been discontinued before the time-tables for that current month were published (though after they were printed) but that the company, notwithstanding, made

(a) 5 ELL. & BL. 860.

no alteration in the time-tables, or gave no notice of such discontinuance. The plaintiff obtained a verdict, which the Court refused to set aside; all of them being of opinion that the company were liable, on the ground that the statement in the time-tables amounted to a false representation of a matter of fact, on the faith of which the plaintiff acted, but which was untrue, to the knowledge of the company, at the time it was made. Lord Campbell and Wightman, J., were also of opinion that the issuing of the time-table with such statement in it amounted to a contract on the part of the company that the trains should start at that hour. In the case now before us however it was clearly proved that the Company's time-tables, which were published and circulated for the public, contained no statement whatever as to the times of arrival or departure of *goods or cattle trains*, but that the book in which such times were stated was printed and used merely for the information of the Company's servants, without being generally circulated. And it further appeared that, according to the book existing and in use for such purposes at the time in question, the first goods or cattle train which started from Retford for Lincoln after the arrival of plaintiff's horses at Retford was that which started at 10.20 a.m., being the train by which plaintiff's horses were in fact conveyed. It was also proved that the three o'clock early train from Retford to Lincoln had been discontinued during the entire of the months of March and April—for nearly seven weeks before the transaction in question; and that the forwarding of plaintiff's horses by the late train at 10.20 a.m. was in accordance with the usual mode of traffic which had existed since the 1st of March. It did not either appear that when plaintiff was sending his horses he made any inquiry as to the time when the train should start from Retford, or would arrive at Lincoln, or that anything was said on the subject.

These several circumstances also distinguish the present case from that of *Wren v. The Eastern Counties Railway Company (a)*, relied on by plaintiff's Counsel. In that case it appeared that for a considerable time plaintiff's fish had been conveyed by the company from

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(a) 1 Law Times, 5 (Nov. 1859).

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Yarmouth to Hinchin, and delivered to him there about half-past eight in the morning, in time for the fish-market ; that, according to the mode of conveyance invariably adopted, the fish used to be sent the evening before from Yarmouth to Cambridge on a fish-truck on a goods train ; that the fish-truck was detached from that train at Cambridge, and was forwarded early the next morning to Hinchin, by attaching it to a passenger train, which arrived at Hinchin about half-past eight. On the occasion in question the fish-truck had been brought the evening before from Yarmouth to Cambridge, and detached there, and the early passenger train started next morning as usual from Cambridge to Hinchin ; but, by some neglect or mistake on the part of the company's servants, the fish-truck was not attached to that passenger train, but was kept at Cambridge for some hours, and then forwarded to Hinchin by a subsequent train, which did not arrive there until about half-past eleven, too late for the market. It was held by the Court that the Company were liable to damages for the delay, on the ground that the fact of their having invariably sent plaintiff's fish by the early passenger train was evidence of a contract on their part to send the fish in question by the same conveyance. In that case however the delay complained of was not, as in the present case, caused by any general alteration in the course of traffic, or by the discontinuance of a train which had previously run, but by the neglect of the company's servants to forward the fish by a train which did actually run, and by which it had been theretofore invariably sent. It also appeared that the packages containing the fish were marked "fish consignment," which, as observed by some of the Court, was consistent with their being sent either by a goods or passenger train ; and it was clear that the omission to forward the fish by the early passenger train was in fact a departure from the ordinary mode of conveyance adopted by the company in respect to those goods.

Having regard therefore to the facts of those two cases, I am of opinion that the decisions in them do not govern that now before us, the circumstances of which are essentially different. I see no ground for holding that in the present case the Company are liable, by

reason of their not having given notice of the discontinuance of the early train from Retford; and, with respect to the construction of the contract to carry and deliver the horses within a reasonable time, I think that the reasonableness of the time should be ascertained by reference to the usual mode and course of traffic existing at the time of the contract, and not merely by reference to the fact that other horses of plaintiff's had been conveyed by the earlier train on some previous occasion.

In my opinion therefore defendants were entitled to a verdict, and that obtained against them should be set aside.

HAYES, J.

I decline to give my opinion on several important questions which have been discussed. But I fasten on two issues, and I rest my judgment upon what depends upon them. The first issue was:—Was it subject to the contract in the first defence stated, that the horses in first count mentioned, were received by defendants as in said first defence alleged? and the jury have said that it was. The sixth issue was:—Did the defendants carry and deliver the horses in first count mentioned to the plaintiff at Lincoln within a reasonable time? and the jury have said that they did not.

These are beyond all question the most important issues in the case; and, upon the sixth issue, it is important to consider the topics which were suggested for the consideration and guidance of the jury. Unquestionably, the jury inquired of my LORD CHIEF JUSTICE with respect to the former course of the trains, and the change which had been recently made, and asked whether the defendants were bound to give notice to the public of the change of time of their trains? The LORD CHIEF JUSTICE said that he thought it reasonable and proper that the defendants should have so done; and thus it was, I think, suggested as an important element for consideration, and one unfavourable to the defendants, that the change in the time of departure of the train had been made without notice to the public or the plaintiff.

Now, I wish it to be distinctly understood that, in my opinion, the

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Company was under no manner of obligation to give to an individual who merely comes into the office to book horses or other cattle by a luggage train any notice of the time or change of time of departure of the train, and more especially when that individual makes no inquiry on the subject. Neither was anything said upon the occasion of the contract being made, whether it was the first or the twentieth occasion on which dealings had taken place between them; so that nothing could have been introduced into the contract by reference to former dealings. The plaintiff booked his horses, and the only undertaking that can be said to have been given by the Company was that implied one, viz., that in consideration of the money to be paid by the plaintiff, they would forward the horses to Lincoln with reasonable care, and within a reasonable time. Accordingly, it appears to me that the fact of the non-communication by the defendants to the plaintiff of the change which had been made in the time of departure of the train was one which ought to have been spoken to by the Court, rather in terms of caution than of encouragement. The Company having reserved to themselves the power of changing the time of departure of their trains whenever they liked, forbore to publish any time-tables of the luggage trains; but that power was always to be exercised subject to this general provision, that they were to carry with reasonable care and expedition; whereas, if there was an obligation on them to communicate the changes from time to time made in the period of departure of the trains, to every individual who contracted to send goods by their railway, it would be better for them at once to publish time-tables, inasmuch as they would thus be compelled to do indirectly what they could not be directly required to perform. Well then, we have here, I think, the jury acting under the impression that the change in the time of departure of the train ought to have been notified to the plaintiff, and they have rested, I think, too much upon it. It is not improbable that, if that suggestion had not been made to them, the verdict might have been different, and so far it was a misdirection. I am therefore of opinion, that the verdict should be set aside and a new trial had.

FITZGERALD, J.

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I concur in the view taken by the Court setting aside the verdict on the second ground, that it is manifest from what took place that the jury considered and came to the conclusion that there was an obligation on the defendants to communicate to the plaintiff the change which had been made in the time of departure of the early train from Retford; and that, as the defendants had not given that notice, their conduct was unreasonable.

In that respect, I think that the jury took an erroneous view of the matter; and, the verdict therefore having been arrived at on improper grounds, the case ought to be re-considered.

APPENDIX.

LAWLER v. KELLY.*

(*Exchequer.*)

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Exchequer.

Nov. 3.

C. PALLES applied for leave to plead in an action of assault and battery—first, a certificate of the dismissal of the complaint upon the merits, under the 24 & 25 *Vic.*, c. 94, s. 44, amended by 25 and 26 *Vic.*, c. 52. Secondly, that the assault was committed in order to prevent a breach of the peace.

Application allowed.—[FITZGERALD, B., *dissentiente*].

assault was committed to prevent a breach of the peace.

To an action of assault and battery, a certificate under the 24 & 25 *Vic.*, c. 94, s. 44, may be pleaded, together with a plea that the

* *Coram* FITZGERALD, HUGHES, and DEASY, BB.

LYONS v. KELLER.*

Nov. 4.

THIS was an action of trover and detinue, for a deed of lease made by the defendant to the plaintiff.

On the 28th of October 1864, the defendant tendered a consent to the plaintiff, that the action should be stayed, the defendant giving up the lease in question to the plaintiff, and paying one shilling damages, and the costs of the action necessarily and properly incurred, and that the consent be made a rule of Court. The plaintiff returned no answer to the consent.

H. P. Jellett (with whom was *G. Waters*) now moved that the action be stayed, upon the terms contained in the consent.

Phillips v. *Hayward* (a), *Peacock* v. *Nichols* (b), *Pickering* v. *Truste* (c), were cited.

P. Keogh, for the plaintiff.

The defendant cannot have the action stayed by surrendering

In an action of detinue, alleging no special damage, the Court will compel the plaintiff to elect whether he will stay all proceedings on delivery of the chattel in dispute, on payment by the defendant of nominal damages, and all the costs of the action, or will proceed for greater damages at the risk of all costs.

(a) 3 Dowl. P. C. 362.

(b) 8 Dowl. P. C. 367.

(c) 7 Term R. 53.

* *Coram* FITZGERALD, HUGHES, and DEASY, BB.

M. T. 1864. *Exchequer.* the lease. The plaintiff may still proceed to trial, and seek larger damages for the detention of the lease. The plaintiff will rest satisfied with an order to that effect, as was done in *Earle v. Halderness (a)*.
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If the plaintiff elects to go on with the action, he will only get the costs of this motion; and should he fail to obtain more than the damages tendered, he will have to pay all the costs of the action. Should he now elect to stay all proceedings, he will get all his costs, including those of this motion.

The plaintiff's Counsel elected to stay all proceedings.

H. P. Jellett contended that the costs of the present motion should not be given to the plaintiff, as he had forced the defendant to the motion, by not accepting the consent tendered, although the order now made was in the very terms offered in that consent.

The Court refused to alter their order, of which the following is the Curial portion:—

It is ordered by this Court that (the plaintiff so consenting) this action be stayed, upon the terms of the said defendant handing over forthwith the said lease, and paying to the plaintiff the said sum of one shilling as damages, and the costs of this cause hitherto incurred, including the costs of this motion, when taxed and ascertained.

(a) 4 Bing. 462.

Nov. 13.

ARKINS v. BARNARD.

A plaintiff, moving to change the venue to the place where the cause of action arose, and where the parties and all their witnesses reside, when a trial held in another district has proved abortive, must pay the costs of the motion.

M. O'Donnell and *Coates*, for the plaintiff, moved to change the venue from the city of Kilkenny to the city of Dublin. The action was one for slander. It had been tried at the Summer Assizes for the city of Kilkenny 1864, before O'BRIEN, J. The jury had been discharged being unable to agree. The cause of action arose in Dublin, and all the witnesses resided there.

W. Ryan (with whom was Serjeant *Armstrong*) opposed the motion.

The plaintiff had selected the city of Kilkenny, and the defendant must pay the costs of the motion.

was perfectly satisfied to have the case tried there. If the Court allowed the motion, the plaintiff must pay the costs : *Comerford v. Daly (a)*.

The defendant filed no affidavit to oppose the motion.

PIGOT, C. B.

We allow this motion. As to the costs, were this the case of a defendant coming in to oppose a motion, made by a plaintiff under circumstances, stated on affidavit, which rendered it a motion of course, as the defendant leaves unanswered the affidavits of the plaintiff, we would not give any costs to the defendant. This Court will discourage opposition to such motions as this. But here the applicant is a plaintiff resident in Dublin, who, although the defendant and all the witnesses reside in Dublin, lays his venue in the city of Kilkenny. It is true that the cause of action arose at a time of the year when the only place where he could have the action tried was in the last town upon the Leinster Circuit; but at that time, in consequence of all the Circuits being out, it may have been impossible for the defendant to move before a Judge in a Chamber to change the venue to Dublin, where all the parties and witnesses reside.

The plaintiff brought his action as soon as possible in one sense, but as late as possible in another. It might very well have stood over to the Sittings after the ensuing Michaelmas Term, when it might have been tried with much less expense in the city where the cause of action arose, and where the parties and all the witnesses on both sides reside. But as the plaintiff chose to lay his venue far away from the city of Dublin, he must pay the costs of now bringing back the action to the place where the venue should have been laid.

The Court refused to measure the costs.

(a) 11 Ir. Com. Law Rep. 62.

M'DONELL v. DOHERTY.

Nov. 23.

THE Sheriff of the county Clare seized the goods of X under an execution at the suit of Doherty. M'Donnell claimed them under his goods by the Sheriff, who had obtained an interpleader order, although therein declared to be entitled to them.

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Upon the bankruptcy of a debtor, before the sale of the Sheriff cannot

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a bill of sale duly registered. On the 23rd of December 1862, the Sheriff obtained an interpleader order directing an issue to be tried, in which M'Donnell was plaintiff and Doherty was defendant. The Sheriff was declared to be entitled to his costs; but the question as to whether they should be paid by the plaintiff or defendant was reserved until the determination of the issue. The Sheriff informed X that he would permit him to retain the goods seized, upon his giving security for them. X refused to give any security; therefore, in November 1863, the Sheriff advertised the goods for sale upon a day in the month of January following. Before the day of sale X became bankrupt, and his assignees took possession of the goods.

The interpleader issue never was tried.

The Sheriff now applied that, pursuant to the order of December 1862, either the plaintiff or defendant be directed to pay him his costs.

P. Keogh appeared for the Sheriff.

C. Palles appeared for the plaintiff.

James Murphy appeared for the defendant.

The COURT refused the motion, as the bankruptcy of X was an unforeseen fatality, not in the contemplation of the parties when the order of December 1862 had been made. As a plaintiff could not, upon the bankruptcy of the defendant, be compelled to proceed to trial under the 106th section of the Common Law Procedure Act 1853, so here, in analogy to that instance, nothing was left to be decided between M'Donnell and Doherty; and the Sheriff could not compel them to proceed to trial merely to determine by which of them his costs were to be paid.

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Queen's Bench

RICHARDSON, *Appellant*, CONWAY, *Respondent*.*

(*Queen's Bench*).

Nov. 18, 21.

THIS was a case stated by the Justices of Tyrone, under the 20 & 21 *Vic.*, c. 43.

Fetherston H. Lowry, on a former day in this Term, moved *HAYES, J.*, in Chamber, for an order to strike the case out of the paper, on the grounds that the conditions precedent, of which performance is required by the statute, had not been complied with.

The omissions complained of were, that the appellant had not served the respondent with a notice, and a copy of the case stated, within three days after he had received it from the Justices, and had not within three days transmitted the case to this Court.

The learned Judge directed notice of the motion to be served. Notice having been served,—

Fetherston H. Lowry now renewed the motion before the Full Court. The affidavits of the respondent, and of the Clerk of the Petty Sessions at Cookstown, stated that the Justices signed the case on the 24th of October 1863; that on that day the clerk delivered it to the appellant, and by his direction forwarded it to his attorney; that the documents were registered, and should, in the due course of delivery, have been received on the 26th of October. The respondent, however, was not served with the notice, or the copy of the case, until the 2nd of November, on which day the officer of the Court received the case. Counsel relied on the 20 & 21 *Vic.*, c. 43, s. 2, to show that those were conditions precedent, and cited *Morgan v. Edwards* (a) and *Woodhouse v. Woods* (b).

D. M'Causland.

It is admitted that the motion must be granted; but the Court has not any jurisdiction to give costs. Where the Court has no jurisdiction to hear the motion, it has none to give costs: *Fraser v. Fothergill* (c).

Fetherston H. Lowry, in reply.

The appellant has, by transmitting the case, brought himself

(a) 5 H. & N. 415.

(b) 29 Law Jour., N. S., Mag. Cas., 149.

(c) 14 C. B. 298.

* Before LEFROY, C. J., and HAYES and FITZGERALD, JJ.

Costs.—The respondent in a case stated from P. S. applied to have the case struck out, as the conditions precedent of 20 and 21 *Vic.*, c. 42, s. 2, had not been complied with; and also for the costs of the application.—*Held*, that the first part of the application being granted, the Court had no jurisdiction as to costs.

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within the jurisdiction of the Court, as to costs.—“Every person “who comes before the Court subjects himself to its jurisdiction “as to costs”—*per* Alderson, B., in *Peters v. Sheehan* (a); and the cases of *The Queen v. Padwick* (b), and *Carr v. Stringer* (c), are clearly in point, that where a case has been dismissed for want of jurisdiction, the Court has power to give costs.—[FITZGERALD, J. The difference between those cases and the present is, that the respondent here, instead of waiting until the appeal motion was made, and then raising his objection, has himself taken the initiative, and moved to strike the case out of the paper.]—The case of *Fraser v. Fothergill* (d) does not help the other side; for there the Court never had any jurisdiction to hear the appeal—in fact no appeal lay; and the respondent had done nothing to bring himself within the jurisdiction.—[FITZGERALD, J. You cited some cases in your opening statement; were costs given in any of them?]—That is not stated; but, as the rules were made absolute, of course the costs followed the order: 2 *Arch. Prac.*, by *Chitty*, p. 1468.—[FITZGERALD, J. Unfortunately your motion is to strike the case out of the paper, because there is no such case in Court.—LEFROY, C. J. You have engendered a motion which is not necessary, for, if you had waited until the case was called on, you would then have had the benefit of the objection, that the statutable conditions precedent had not been fulfilled.—FITZGERALD, J. In what case are we to enforce the costs? There is no case in Court, if your motion is well founded.]—In the case named in the paper.—[FITZGERALD, J. If your case is in Court, then your motion is wrong.]—But the Court will follow the decisions in the English cases which I have cited.—[FITZGERALD, J. We *will* follow those decisions, by striking this case out of the paper, and saying nothing about the costs.]

Per Curiam.—Strike out the case; no rule as to costs.

(a) 10 M. & W. 214.

(b) 8 El. & Bl. 704.

(c) 1 El., Bl. & El. 123.

(d) *Ubi supra*.

Appendix.

M. T. 1864.
Queen's Bench

THE QUEEN, at the prosecution of PATRICK DONOHOE,
v.
WILLIAM WEBB, HENRY DOPPING, JOHN EDWARD
THOMPSON, and JOHN H. KEOGH, Esqrs., Justices of
the Peace in and for the county of Longford.*

Nov. 17.

In this case, a conditional order, dated 12th of August 1864, for a writ of *certiorari* was made absolute on the 7th of September, no cause having been shown. The writ issued, and commanded the Justices, or one of them, to return the record of conviction of the prosecutor on the 22nd of June 1864, with the evidence, informations, warrants, and all things touching the same.

The writ having been made absolute, Messrs. J. H. Keogh, the resident Magistrate, and Henry Dopping, made a return that the prosecutor was convicted of having, on the 5th of June 1864, "by threats, endeavoured to force Michael Dolan, a workman in the employment of John Edward Thompson, Esq., of Clonfin, in the county of Longford, to depart from his said work, contrary to the form;" and that Patrick Donohoe was by them (Messrs. Keogh and Dopping) ordered and adjudged to be, for the said offence, committed to, and confined in the common gaol of Longford, for the space of three calendar months, there to be kept to hard labour for the space of three calendar months.

The order-book showed that the order was made by the four Justices named in the writ.

In the present Term (November 5th) it was ordered by the Court that the subject-matter of the return should be set down for argument.

On the 15th of November it was argued, on behalf of the prosecutor, by—

Harkan and *M. Morris*, who, for the purpose of showing (*inter alia*) that the conviction took place out of Petty Sessions, proposed to use the affidavits on which the prosecutor had obtained his conditional order.

Sidney (with *Richardson*), on behalf of the two Justices (Messrs. Keogh and Dopping) who made the return, resisted that proposal; and contended that, on argument upon a *concilium*, the parties could not travel outside the record itself. To do so in this case

Certiorari.—
Conviction
quashed, as
being made out
of P. S. On
making up the
order in the
office, it was
found that
costs would go
against the de-
fendants. On a
subsequent ap-
plication by
the defendants
this Court gave
the prosecutor
the option of
losing his costs
in this pro-
ceeding, or ac-
cepting them
on the terms
of not bring-
ing an action
for the illegal
conviction.

* Before the Full Court.

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 v.
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 LONGFORD.

would, Counsel said, be not only contrary to the practice in law arguments on both sides of the Court, but would be peculiarly unjust, since the Justices had filed no affidavit to show cause, and were therefore without the means of now explaining or answering the case made by the prosecutor in the affidavits filed on his behalf.

A suggestion was made by the Court, to the effect that the proper course would be to let the case stand, in order that the prosecutor might make such an application as he might be advised, with a view to bring before the Court such documents as he thought himself entitled to use upon the argument, touching the sufficiency in law of the return.

Sidney then admitted that any affidavits which his clients could make would only refer to the matters of aggravation in the case, and that the order was made out of Petty Sessions; and therefore consented that the return should be quashed at once.

When the order quashing the return was being made up in the office, the discovery was made that costs were thereby awarded to the prosecutor against Messrs. Keogh and Dopping. Accordingly, on their behalf,—

Sidney (with *Richardson*) asked the Court to omit the costs from the order, as the prosecutor had not been restrained from bringing an action against the Justices, who would willingly pay the costs if that usual condition was imposed on the prosecutor.—[LEFROY, C. J. That is my habitual recollection of the practice. If an action is to be brought, the Court will not give the costs, because they are an ingredient in the damages. The jury will take into consideration that, besides what they give as damages for the actual wrong, the party will have to pay his costs in this proceeding.]—Just so; and, in *The Queen v. The Justices of the county of Dublin* (a), the order was made *without costs*.*

M. Morris (with *Harkan*), contra. •

The prosecutor is entitled to get his costs.—[LEFROY, C. J. Then we must ask him to bring no action.]—Perhaps that term will not be imposed in this case. *The Queen v. The Justices of the county of Dublin* was one of the most peculiar cases that ever came before the Court; because the prosecutor in it was destitute of merits, and the order of the Justices was reversed for a merely technical flaw of illegality; and the prosecutor there had unquestionably

(a) 13 Ir. Com. Law Rep. 375.

* The Crown-book was produced in Court by the Clerk of the Crown, and thence it appeared that Counsel's statement was accurate.

been guilty of a grievous offence. Here, on the contrary, the prosecutor has been convicted *out* of Petty Sessions, and of an offence not known to the law.—[LEFROY, C. J. Do we ever weigh the amount of illegality?—But there was here no summons and no warrant.—[O'BRIEN, J. In *The Queen v. The Justices of the county of Dublin (a)*, I think that the only defect was, that the order had been made *out* of Petty Sessions.]—Yes; but, in the present case, everything is monstrously the other way; and it is not *certain* that a jury will give the costs if the action is brought; at all events, if the prosecutor gets them now he cannot recover them in the action.

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Richardson, in reply.

[FITZGERALD, J. Does it appear that the prosecutor was arrested on any warrant?—No.—[FITZGERALD, J. And is it the case that he was arrested on the parol report of a conversation?—That does not appear; but Messrs. Keogh and Dopping had nothing to do with the matter, save that they were summoned by the sub-inspector to attend at Court; that they attended, and that they acted as Justices. They therefore have at most been guilty of a mistake in law only, even though the order was made *out* of Petty Sessions, and the offence is unknown to the law. There would have been jurisdiction to convict without summons, had not the 1 G. 4, c. 56, been repealed by the Summary Jurisdiction Act; and that repeal does not appear in its schedule. To visit with costs two out of the four Justices, would be to prejudge the case. At the trial, the jury will think that the Court has condemned the Justices beforehand.—[O'BRIEN, J. Why did you come in to support the conviction on this argument, instead of notifying to the prosecutor that no opposition would be offered?—*Sidney*. The adoption of that course would not have lessened the expense. The writ went against four Justices. We appear for only two of them; and it would have been impossible to take away from the others their protection. In *The Queen v. The Justices of the county of Dublin*, inquiry was made in the Crown-office as that notice had been given. Everything possible was done to avoid expense; but it was found that the matter could not be set right without making up the books for argument. We could not give consent for the Justices.

LEFROY, C. J.

Under the circumstances of this case, we will not give the costs.

(a) *Ubi supra*.

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There is nothing to preclude the prosecutor from recovering the costs in an action; and he is prepared to bring an action. We therefore, by withholding the costs in this proceeding, do not preclude him from recovering the costs.

E. T. 1865.
May 5.

PURSER v. LUCOVICH.*

If an attorney is carrying on proceedings for a party in this country, he will be compelled to accept service of a writ in an action against his client, arising out of the same matter, though he is at the time unaware of his client's whereabouts.

THIS was an action to make absolute a conditional order for substitution of service of the writ of summons and plaint. The action was for damage done to a certain cargo of wheat, delivered at Waterford by the defendant to the plaintiff. After the delivery of the cargo, the defendant, on the 31st of March, sailed for Cardiff in Wales, the plaintiff refusing to pay him the freight. On the 24th of March, Messrs. J. & J. Bennett wrote, as attorneys for defendant, demanding the freight; and on the 3rd of April served a writ for it. The plaintiff being advised that he could not raise a satisfactory issue in that action, then brought the present cross action for the damage, issuing his writ the 10th of April. The plaintiff's solicitor then wrote to the solicitor for the defendants in the first suit, asking them to accept service of the second writ, which they refused to do. The affidavit of the Messrs. Bennett, filed as cause against the conditional order, stated they had never known anything of the defendant until he called to instruct them in the first action. That during the stay of the defendant in this country, they never received from the defendant, nor from any other person, any intimation that the plaintiff had any intention of instituting the present action; that they have not received any instructions from the defendant, nor from any other person, to enable them to defend this action, nor have they any means of communicating with the defendant, with whom they have had no communication, direct or indirect, since the 28th of March. That they are informed and believe that said defendant has already sailed from Cardiff for Galatz, and is now prosecuting the said foreign voyage, and beyond the reach of present communication from them. From the affidavits filed against the cause shown, it appeared that neither the plaintiff nor his solicitor were aware that the defendant was about to leave the country, before their mutual claims were settled, nor were they aware of his departure for several days after it took place.

* *Coram* HAYES and O'BRIEN, JJ.

Chatterton now moved to make absolute the conditional order. E. T. 1865.

The question is, do the Messrs. Bennett represent the defendant *quoad hoc* : *O'Dwyer v. Jackson* (a). Where this agency existed, the Court has actually gone so far as to impound the sum recovered in one action to abide the result of another : *Apostolu v. White* (b), in the Common Pleas.

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Exham, for the cause shown.

The damage was done to the cargo in the port of Youghal, so it will be absolutely necessary to communicate with the captain. No mention of this action was made while the captain was here. It was only a question of freight, depending on the construction of the charter-party in the first action, so there was no cause for Lucovich to stay.—[HAYES, J. If not now in communication with the defendant, the solicitors must have the power to communicate; if, for instance, they get a verdict in the first action.—O'BRIEN, J. You must distinguish between opposing this motion, and asking further time to plead.]

Per Curiam.—Make the order absolute, sending copy by registered letter to Galatz, and extend the time to plead as the parties may arrange.

(a) 4 Ir. Jur. 129.

(b) 8 Ir. Com. Law Rep., App., xxii.

TRAVERS v. POTTS.*

April 29.
May 1.

THIS was a motion to set aside the third and sixth defences in this case. The first paragraph of the summons and plaint alleged that, on the trial of a certain action for libel, brought by the plaintiff, the plaintiff was sworn as a witness, and truly gave her evidence on oath, that afterwards the defendant, well knowing the premises, falsely, &c., printed and published in a certain newspaper, &c., of and concerning the plaintiff, and of and concerning the said trial, and the evidence so as aforesaid given by the plaintiff, the

The plaint alleged the printing and publishing of certain libellous words. The defendant pleaded that the said words were part of two separate articles published in the

defendant's newspaper, and that "the said articles were, and each of them was and is a bona fide comment," &c. Held bad, the defendant allowed to amend "and the said words were," &c.

* *Coram*, LEFBOY, C. J., O'BRIEN, HAYES, and FITZGERALD, JJ.

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words following, &c.; meaning thereby, that the plaintiff had committed perjury on the said trial. The second count set out another newspaper article on the same case, with the same inuendo. The third defence to the first paragraph was that the defendants were the proprietors of a certain newspaper, and that the action brought by the said plaintiff, as in said count mentioned, was one of great public interest and notoriety, and that the words in the said count of the summons and plaint complained of were part of two separate articles printed and published in their said journal; "and the said defendants say that the said articles were and are, and each of them was and is, a fair and *bona fide* comment upon the said action," &c. The sixth defence was, that the words complained of "were and are *part of two separate articles* printed and published in two other newspapers, to wit," &c., "*which said several articles were and are,*" &c.

Serjeant *Armstrong* (with him *Butt* and *Waters*) now moved to set aside these defences as embarrassing. This defence adopts the meaning given by the inuendo: it states that the articles were a fair comment; yet these parts may be libellous, and we have a right to select those parts. The question is not whether the articles taken *in extenso* are a fair comment; whether matters of which we do not complain, taken with matters of which we do complain, is a fair comment. It is an attempt to prejudice the jury, by introducing matters of another kind, injurious to the plaintiff.—[LEFROY, C. J. How can you get the fair meaning, without taking the context?—Just so, they have a right to read the articles *in extenso*, under the traverse of the inuendo of defamatory sense. But they would not have a right there, as they would under this defence, to go into evidence of the different matters alleged in the libel. *Bremridge v. Latimer* (a).—[Mr. *Whiteside* objected to these ephemeral productions being cited as an authority in argument].—[LEFROY, C. J. Why, we have had copies of the *Times* newspaper cited before us.—O'BRIEN, J. Does not the plea that the article is a fair comment include a plea that this part was a fair comment.]—That would not at any rate apply to the sixth defence; there the words complained of appeared in this country; and it is alleged that an article printed in London was a fair comment. With these other papers we have nothing to do. People read them as they appeared in their journal here, but how they appeared in the other papers we know not. The defence says that the "words

(a) 12 W. Rep. 878.

complained of" are part of certain articles. The word perjury does not occur among the words complained of, it is only in the inuendo. E. T. 1865. *Queen's Bench*

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Whiteside (with him *Todd*), to support the defence.

This is not a plea of justification. One of the reasons alleged against this plea is, that it tenders an immaterial issue. The words referred to in the article had reference perhaps to a certain pamphlet of the plaintiff's, and not to her evidence at the trial. I have a right to show that this is a fair comment, without saying that I justify the facts.—[FITZGERALD, J. Does your plea, or does it not, admit the sense alleged?—No, we do not notice the sense alleged. In the case cited, the defendant put in a plea of justification as to another charge: *Cox v. Feeney* (a). We have here adopted the correction introduced into the plea by the Lord Chief Baron, in *Clinton v. Henderson* (b). In *Lucan v. Smith* (c) the defence was allowed, that the libel was a fair comment. *Hoare v. Silverlock* (d).

Todd.

This is a plea of privilege put upon record without dealing with the inuendo. There is no authority to show that if a plea of privilege is put in, we are obliged to adopt the meaning put upon the libel by the inuendo.—[HAYES, J. Have you any authority to show that if you plead in excuse, you are not obliged to take the libel in the sense imputed?—In *Clinton v. Henderson* the inuendo fixed on the libel a meaning imputing a criminal charge, and the plea allowed by the Exchequer does not deal with that.

Butt, in reply.

Their whole plea only traverses malice, yet they do not admit the inuendo.—[O'BRIEN, J. Is there any case in which the inuendo is distinctly admitted at the same time with a plea of privilege?—*Dunne v. O'Grady* (e) is a case where they denied the averment, and pleaded privilege at the same time.—[O'BRIEN, J. The issue must go to the jury on the first count, whether the words were spoken in the defamatory sense alleged; and when the jury have found that, the defendant must be bound by it on the other count.]—As to the sixth defence introducing an article from another paper, it does not say, except inferentially, that these words

(a) 4 F. & F. 13.

(b) 13 Ir. Com. Law Rep., App., xliii.

(c) 1 H. & N. 481.

(d) 9 C. B. 20.

(e) 5 Ir. Com. Law Rep. 450.

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are a fair comment. Suppose a life of a man written containing certain statements, the whole life might be a fair comment, yet certain parts of it a libel.—[LEFROY, C. J. If they can give it in evidence, all this will be before the jury.]—Yes, all the article may be given in evidence, but they may not go and show that the whole of the article was a fair comment on the proceedings. Suppose the trial concerned two distinct charges, and the article dealt with those charges, then evidence might be given to prove under this plea what the charges were.

Cur. adv. vult.

LEFROY, C. J.

May 1.

We have considered this case, and will allow such modification in the pleading as we think will place the question to be tried properly before the jury.

O'BRIEN, J.

If this plea were allowed to stand, while the articles are not set out in the plea, it would leave the question before the jury without limit. We shall allow the defendant to amend thus, "and *the said words* were and are," &c., leaving out "and the said articles were," &c.

T. T. 1863.

June 3.

ENRIGHT v. ENRIGHT.*

Affidavit to ground a Judge's fiat, made before any writ issued, and so without title of cause, or the Court in which it was sworn.—*Held*, that the fiat issued thereon was good, the writ having been issued before the fiat.

THIS was a motion for the discharge of the defendant from custody. He had been arrested under a fiat of the Lord Chief Baron. The ground stated in the notice of motion for discharge of defendant was, that "said order was improperly obtained, there being, when same "was obtained, no affidavit duly sworn in the action to warrant the "making of said order; the affidavit used before the said Chief "Baron having in fact been sworn on the day previous to the "issuing of the writ in this action."

James Murphy now moved for the discharge of the defendant. The affidavit was sworn before any action was pending; it bore no title of the Court, or the cause; it was a mere nullity.

* Before the Full Court.

W. M. Johnson, contra, cited *Hargreave v. Hayes* (a), where the point was expressly decided, on the ground that the title of the affidavit may be rejected as surplusage. The test as to whether it is an affidavit or not is, might the party be indicted for perjury?—[O'BRIEN, J. It would be very difficult to frame an indictment for perjury.]—By the second section of Pigot's Act (3 & 4 Vic., c. 105), the only things required are that he shall be the plaintiff in the action. The writ here was issued before the fiat issued. The fiat must be made after the case is commenced. *Chitty's Archbold*, p. 737, cites *Hargreave v. Hayes* as ruling the point.

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Murphy, in reply.

The affidavit must be such as a party could assign perjury upon. Could he in this?—*Kirk v. Almond* (b); *The Queen v. Pearson* (c). No Court is stated in the title; so there is no evidence that the affidavit was taken before any competent authority—[HAYES, J. It just occurs to me that, under the old practice, where a party makes an affidavit to ground a side-bar rule, there was no necessity for any writ to issue.—FITZGERALD, J. The words "if any plaintiff" have been interpreted to mean any person *who is*, or *who is about to be*, a plaintiff. What is more important is the omission of the Court.]—If plaintiff, "he may make it appear by affidavit of himself," or any other person, which shows that he must have a *locus standi* as a plaintiff. The Commissioner for taking affidavits has authority only for each Court; and it must appear what the Court is, to show his authority.—[FITZGERALD, J. It is to be used in some one of the Law Courts. It becomes an affidavit when filed in some one of the Law Courts.—O'BRIEN, J. Take the case of a cause petition, which is verified by affidavit before it is filed.]

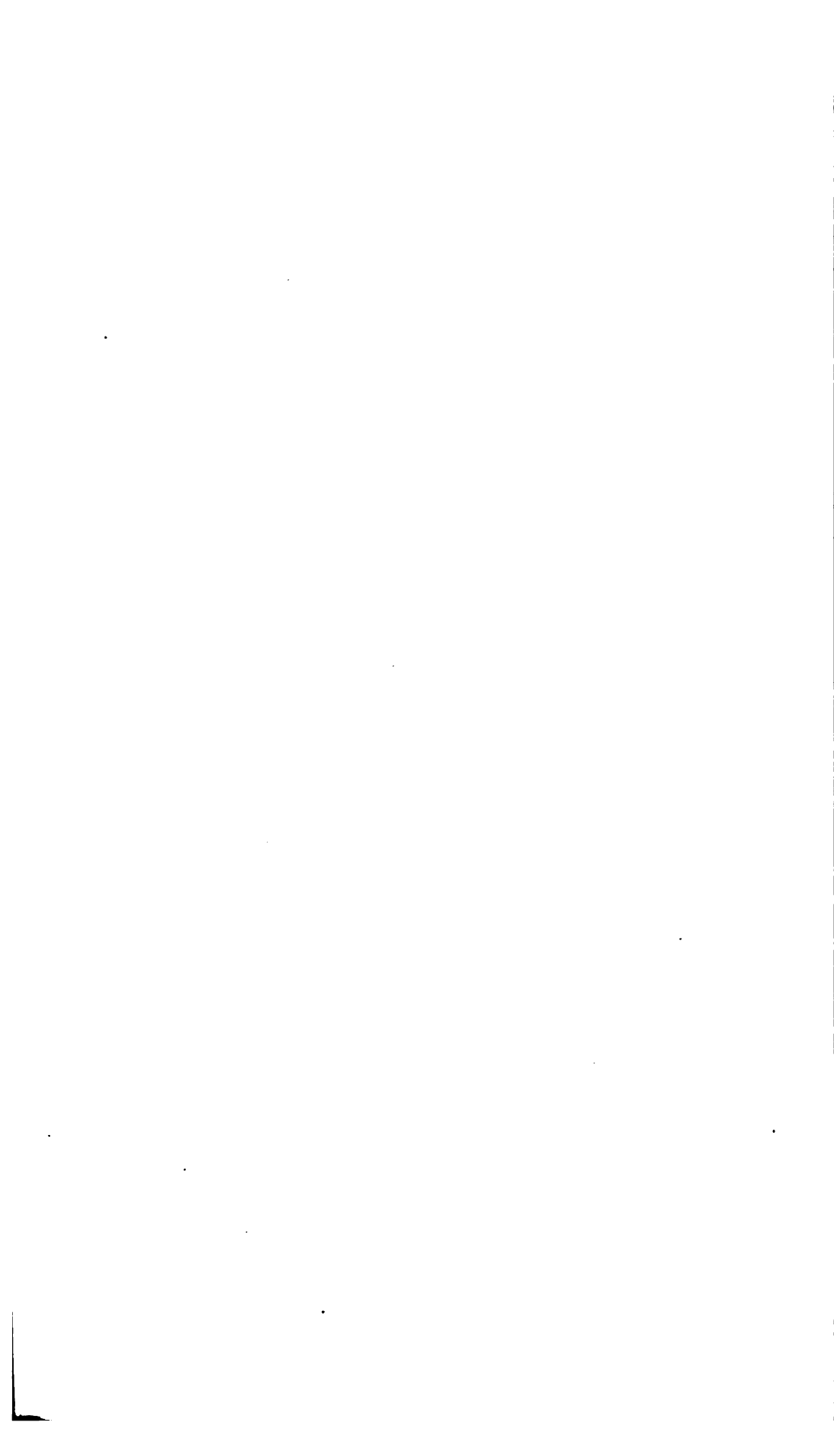
LEFROY, C. J.

We must refuse this application, with costs; there are clear authorities against it.

(a) 24 Law Jour., Q. B., 281.

(b) 1 Dowl. 318.

(c) 8 Car. & Payne, 119.



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APPRENTICE.

A, a licentiate apothecary, covenanted to instruct B in his art and mystery of apothecary, in the best ways and means he could. B. having sued A for a breach of this covenant, proved at the trial that at the time of the execution of the indenture of apprenticeship, A kept an open shop for the compounding of the prescriptions of other medical practitioners as well as his own, but that he afterwards closed the shop to the public, and used it merely for the purpose of compounding medicines for his own practice, and ceased to be registered as apothecary in the Medical Register.—*Held*, that A did not thereby become disqualified from teaching B

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pursuant to his covenant, so as to entitle the latter to a direction that A had broken the covenant. C. P.
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By Act of Parliament, a Railway Company were bound to keep in repair "the immediate approaches" to a certain bridge. The Justices of the county made an order on summons, requiring the Company to repair "ninety-two perches of the road leading and being the approach to the bridge," &c.—*Held*, a bad conviction, for not showing that this space was "the immediate approaches," which alone the Justices had jurisdiction to order to be kept in repair.
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M. J., suspected of having committed felony, was followed and stopped by

a constable in plain clothes. The constable having told *M. J.* what he was, and that she (*M. J.*) was charged with felony, proceeded to put several questions to her, relative to a parcel in her hand, which contained the goods supposed to have been stolen. At the time he asked the questions, the constable had not told *M. J.* that she was under arrest, "but he would not have let her go." He did not expressly hold out any threat or inducement to *M. J.*; nor did he, before she answered him, give her any caution. *M. J.* having answered the questions, the constable then told her she was not bound to say anything that would criminate herself; and said he should bring her to the police-office.—*Held*, by eight Judges, that the conversation between *M. J.* and the constable was receivable in evidence; and, by three Judges, that it was not so receivable.

Cases on this point generally reviewed. Ct. Crim. Ap. *Regina v Johnston* 60

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To an action by indorsee against acceptor of a bill of exchange, for £97. 4s. 9d., payable three months after date, the defendant pleaded that said bill was passed to secure, amongst other things, a sum of £39. 8s. 3d., due by *T. C.*, before he was discharged as an insolvent, to plaintiff, which debt afterwards duly appeared on the insolvent's schedule, together with interest, up to passing said bill to plaintiff; that *T. C.* was afterwards duly discharged from said sum by virtue of the proceedings in the said insolvency, of which the plaintiff, at the time of drawing, &c., said bill,

had notice; and also to secure £30, advanced by plaintiff to defendant, at the time of the acceptance and indorsing of said bill; that, save said £30, there was no consideration for the acceptance, &c., of said bill; that, since said bill became due, defendant had paid £5, parcel thereof, to plaintiff. Averment of payment into Court of £30.—*Held*, on demurrer, that the suspension of the plaintiff's remedy to proceed against the after-acquired property of his debtor, in the Insolvent Court, was a sufficient consideration for the indorsement of the bill, to make him a holder for value; and that his right to recover against the acceptor was not affected by the 230th section of the Irish Bankrupt and Insolvent Act 1857, notwithstanding that the bill had been in part passed to secure the scheduled debt of the drawer.

Held (Per MONAHAN, C. J.), that this result equally followed, whether the bill in question was to be regarded as having been accepted for the accommodation of the drawer or not.

Held (Per CHRISTIAN, J.), that the defence sufficiently showed that the indorsing of the bill was part of the original transaction, and that the bill had not been accepted for the accommodation of the drawer. C. P. *Bernal v. Croker* 194

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1. A, resident in the county of Dublin, agreed to sell to B, who resided in the same county, a quantity of bricks to be delivered in the county of the city of Dublin. The bricks having been delivered, A sued B for their price, in one of the Superior Courts, and recovered £10.—*Held*, that the plaintiff was entitled to half-costs, "the cause of action" having arisen out of the civil-bill jurisdiction in which both parties resided. Ex. *Enright v. Kavanagh* 142
2. The "registered Dublin residence" of an attorney, who lives with his family, more than three miles from the city of Dublin, and practises under a country license, is not "a residence," within the meanings of the Common Law Procedure Act (Ireland) 1856, s. 97, or of the 14 & 15 Vic., c. 57, s. 69, in the civil-bill jurisdiction of the city of Dublin. Ex. *Tudor v. Lawson* 144
3. The plaintiff, in an action of contract, who was an officer of the Court of Chancery, resided for the greater part of the year in the county of Dublin, but also had a house within the East Riding of the county of Cork, where also defendant resided permanently, and the cause of action arose. The plaintiff having recovered a sum not exceeding £20, the Taxing Master allowed half costs.—*Held*, on a motion to review taxation, on the ground that, under the Common Law Procedure Act 1856, s. 97, no costs ought to have been allowed, that the plaintiff was entitled to half costs, inasmuch as his house in the county of Cork was not his usual residence.
Moffett v. M'Ternan (6 Ir. Jur. 177) followed. C. P. *Dawson v. Coleman* 509
4. A plaintiff moving to change the venue to the place where the cause of action arose, and where the parties

and all their witnesses reside, when a trial had in another district has proved abortive, must pay the costs of the motion. *Ex. Arkins v. Barnard*

App. ii

5. Upon the bankruptcy of a debtor, before the sale of his goods by the Sheriff, who had obtained an interpleader order, the Sheriff cannot obtain his costs of the order, although therein declared to be entitled to them. *Ex. M'Donnell v. Doherty*

App. iii

6. The respondent in a case stated from P. S. applied to have the case struck out, as the conditions precedent of 20 & 21 *Vic.*, c. 42, s. 2, had not been complied with; and also for the costs of the application.—*Held*, that the first part of the application being granted, the Court had no jurisdiction as to costs. *Q. B. Richardson appellant, Conway respondent*

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7. *Certiorari*.—Conviction quashed, as being made out of P. S. On making up the order in the office, it was found that costs would go against the defendants. On a subsequent application by the defendants this Court gave the prosecutor the option of losing his costs in this proceeding, or accepting them on the terms of not bringing an action for the illegal conviction. *Q. B. Regina v. Justices of Longford*

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A deed executed by A, on behalf of B, must, in order to bind B, be executed by A in the name of B, or by A in his own name, with such words as show that he is acting solely as the agent of B in such execution.

A company incorporated by regis-

DEFAMATION.

tration is not bound by a deed of agreement entered into by its directors, as trustees for or on behalf of the Company, which is not under the seal of the Company. *Ex. M'Ardle v. The Irish Iodine Company (limited)* 146

DEFAMATION.

A, an importer of French brandy, complained of the following libel, contained in a letter written by B to the attorney of A, "Now, as to Mr. S., I warn him that I am willing to leave the matter to arbitration; as to his conduct, I did not say half enough; it more resembles that of a freebooter than of an honorable British merchant." In one count, which contained a preliminary inducement, the innuendo was that the conduct of the plaintiff towards defendant, in relation to defendant's advertisement, and in the negotiations, stated in the inducement, was "dishonest and dishonorable, and unworthy of an honorable British merchant." In another count, the innuendo was that plaintiff had been guilty of discreditable and dishonorable conduct in his said trade. The defendant pleaded that he had published a notice complaining of the quality of some brandy, which had got a prize medal; that plaintiff employed an attorney to write to him complaining of the publication, to which he replied that it was not plaintiff's brandy to which he referred; that thereon the plaintiff, through his attorney, insisted, as the terms for forbearing legal proceedings against defendant, that he should procure the publication of an advertisement in commendation of plaintiff's brandies, as furnished by plaintiff, fifty times, at his own expense, and should pay plaintiff £20, otherwise that legal proceedings should be forthwith commenced. That believing said demand of £20 to be extortionate and unjust, and the other terms to be unfair, and that he had an interest in inducing the plaintiff and his attorney to abandon their said de-

DEMISE.

mands, he, *bona fide*, and with a view to his interests, and believing the same to be warranted by the circumstances, wrote the said letter to the plaintiff's attorney, in reply to his letter threatening proceedings.—*Held*, on demurrer, to be a good plea of privileged communication. C. P. *Sayer v. Begg* 459

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In an action of detinue, alleging no special damage, the Court will compel the plaintiff to elect whether he will stay all proceedings on delivery of the chattel in dispute, on payment by the defendant of nominal damages, and all the costs of the action, or will proceed for greater damages at the risk of all costs. Ex. *Lyons v. Keller* *App. i*

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A tenant in common has no right to use the name of his co-tenant in common as a co-plaintiff in an action of ejectment for non-payment of rent without his consent; and the Court will, on motion at the instance of the party whose name is employed, direct the name to be struck out, and the plaintiff's attorney to pay the costs. C. P. *Stubber v. Roe* 506

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EXECUTORY DEVISE.

See WILL, 1, 2.

FEE-FARM GRANT.

See LIMITATIONS, STATUTE OF, 2.

FIAT FOR ARREST OF DEBTOR.

Affidavit to ground a Judge's fiat, made before any writ issued, and so without title of cause, or the Court in which it was sworn.—*Held*, that the fiat issued thereon was good, the writ having been issued before the fiat. Q. B. *Enright v. Enright App. xiv*

FISHERY.

See LANDLORD AND TENANT, 2.

FRAUD.

See PLEADING, 2.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FREEMAN FRANCHISE.

See REGISTRY APPEAL, 11.

FRANCHISE, PARLIAMENTARY

See REGISTRY APPEALS, 1 to 11.

FRANCHISE, MUNICIPAL.

1. A man who (being rated for premises in the city of Dublin, which include a "house, warehouse, counting-house

or shop," and having the other necessary qualifications), parts with the possession of the whole or of part of such premises other than the "house, warehouse, counting-house or shop," does not thereby disentitle himself to have his name inserted in the burgess-roll. *Q. B. R. Johnston v. Lord Mayor of Dublin* 1

2. A burgess of a borough (other than Dublin) in Ireland, is disentitled to have his name retained on the burgess-roll, if the rate-book, for the time being in force, does not evidence that the *very* premises, in respect of which he claims a right to the municipal franchise, were, during the twelve months prior to the last day of August preceding the revision, rated to the relief of the poor, at the annual rated value of not less than £10. *Q. B. Regina v. Mayor of Belfast* 154

GOODS, ACCEPTANCE OF.

See STATUTE OF FRAUDS.

GUARANTEE.

1. The defendant gave to the plaintiff the following guaranty:—"Gentlemen, you will please to credit Mr. A to the extent of £30 monthly, from time to time, and in default of his not paying, I will be accountable for the above amount."—*Held*, that the words "for the above amount" did not confine the defendant's liability on foot of the guaranty to the sum of £30; but that he was responsible for all goods supplied by the plaintiff to A, to the extent of £30 monthly.

To a summons and plaint containing three counts, the first on a bill of exchange by indorsee against indorser, averring notice of dishonor; the second on the same bill, averring waiver of such notice; and the third on a guaranty; the defendant pleaded to the first two counts traverses of the above averments, and to the third payment into Court. The jury found for the defendant on the issues on the first two pleas; and they also found

that £245. 11s. 10d. was due on foot of the guaranty, over and above the sum paid into Court. It appeared at the trial that the bill had been given on account of the defendant's liability on the guaranty. The defendant's Counsel called on the Judge to direct a verdict for the amount found due on the guaranty, less the amount of the bill; but no application was made to him to amend the pleadings. A verdict was directed for the whole amount found due on foot of the guaranty. On motion to reduce the verdict by the amount of the bill of exchange, or for a new trial, on the ground that the Judge should have amended the pleadings, the Court refused to reduce the verdict, and *Held*, that, as the defendant had confined his defence at the trial to the construction of the guaranty, the Court would not set aside the verdict, for the purpose of enabling him to set up a new defence by his pleadings, namely, that the bill was given in satisfaction of the sum due under the guaranty, and that he had not due notice of its dishonor. *C. P. Tenant v. Orr* 397

2. The defendant undertook to see the plaintiff paid for certain goods supplied by him to A, at the defendant's request. After the goods had been supplied, and A had made default in payment, the defendant acknowledged his liability under the guaranty, and promised to pay the plaintiff the price of the goods. Neither the guaranty nor the subsequent promise were in writing.

Held, that the plaintiff was entitled to recover on an account stated. *C. P. Wilson v. Marshall* 467

ILLEGALITY OF BILL OF EXCHANGE.

See CONSIDERATION.

INCORPOREAL HEREDITAMENT.

See LANDLORD AND TENANT, 2.

INDUCEMENT, &c.

INDUCEMENT TO PRISONER TO CONFESS.

See CONFESSION.

INSOLVENT ACT, EFFECT OF DISCHARGE UNDER.

See CONSIDERATION.

INTERPLEADER ORDER, COSTS OF.

See COSTS, 5.

IRREGULARITY.

See SETTING ASIDE JUDGMENT.

JOINT-STOCK COMPANY.

See DEED, EXECUTION OF.

JOINT TENANCY.

See LIMITATIONS, STATUTE OF, 1.

JUDGMENT.

See SETTING ASIDE JUDGMENT.

LANDLORD AND TENANT.

1. In an action on a covenant in a lease against an assignee, the first count averred generally that all the estate and interest of the lessee in the demised premises came by assignment to the defendant; the second count set out the title of the defendant as assignee; and, as one of the steps of that title, stated the will of the lessee, whereby he devised all his property to his widow for life, with power of appointment among her three daughters, of whom the defendant was one, and averred that in execution of that power the widow had appointed the demised premises to the defendant; the count then stated the death of the widow and entry of the defendant. The defendant traversed the averment in the first count, and as to the second pleaded that the widow had not executed the power of appointment as alleged.

The plaintiff at the trial stated and proceeded to prove the title of the

LANDLORD AND TENANT. 583

defendant as set out in the second count, but failed to show that any appointment under the power had in fact ever been made; but, in order to show exclusive possession by her of the demised premises, he proved the following acts of ownership:—that, since the death of her mother in 1859 (four years before the commencement of the action), the defendant and her husband had resided on the premises, and farmed the land, and that after his death the defendant alone had managed and received the rents of the property; that she had applied by letter to the plaintiff for a renewal of the lease to her, describing herself as representative of her father; and that, after judgment by default in an ejectment for non-payment of rent, she had redeemed the premises. A verdict was directed for the defendant on both issues.

Held, per MONAHAN, C. J., BALL and KEOGH, JJ. (*dissentiente* CHRISTIAN, J.), first, that the evidence of possession was sufficient to sustain the averment in the first count.

Secondly, that, assuming that the plaintiff could not recover on the second count, by reason of his having failed to prove one of the averments contained in it, viz., a due execution of the power, he should not be precluded from recovering on the first count.

Thirdly, that assuming the defendant was tenant in common with her two sisters of the demised premises, that could not be relied on under the traverse to the first count, but must be pleaded in abatement.

Held, per MONAHAN, C. J., that the evidence of possession was sufficient to support the second count.

Held, per CHRISTIAN, J., firstly, that the rule that in an action against an assignee of a lease, the landlord is allowed to rely on evidence of possession as *prima facie* evidence of assignment, is founded on his presumed

ignorance of the real state of the defendant's title; but if the landlord relies on a particular derivation of that title, the reason of the rule ceases; and this applies not merely to the case where the landlord relies upon that particular derivation of title in pleading, but where he founds his right of action upon it at the trial in statement and in proof; and that, as the plaintiff made a due execution of the power part of his case at the trial, he was bound to prove it.

Secondly, that, assuming that the acts of ownership showed exclusive possession by the defendant, the period (four years) over which they extended was not sufficient in law to found the presumption of a due execution of the power.

Thirdly, that the evidence did not prove exclusive possession by the defendant, but was as consistent with the non-existence as the existence of a deed executing the power; and therefore that the plaintiff was not entitled to have either issue left to the jury. C. P. *Shee v. Gray*

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2. An action was brought for the interruption and hindrance of the plaintiff in his fishery, &c., which had been let to him by the defendant by parol for a year. The defendant having traversed the fact of the letting of the fishery to the plaintiff—*Held* (CHRISTIAN, J., *dissentiente*), that though an incorporeal hereditament, there was such an agreement by the plaintiff to hold, what was equivalent to land, under the defendant, in consideration of a rent for a period not exceeding a year, as would by the combined operation of the 3rd and 4th sections of the Landlord and Tenant Law Amendment Act (Ireland) 1860 create the relation of landlord and tenant, and that the action was maintainable.

Held, per CHRISTIAN, J., that the 2nd section of the Statute of Frauds,

LIMITATIONS, STATUTE OF.

7 W. 3, c. 12 (*Ir.*), prevented the application of the above Act to the present case, and that the action did not lie. C. P. *Bayley v. Marquis of Conyngham* 407

LACHES.

See MANDAMUS, 1.

LAND CLAUSES CONSOLIDATION ACT.

Case stated. By a Special Act, a Railway Company were permitted to construct certain works, under conditions more onerous for the Company, than the similar provisions of the Land Clauses Act required. This Special Act contained no provisions for the future repair of the works so constructed, but provided that nothing therein should exempt the Company from the provisions of any General Act. The Company having fulfilled the conditions as to the construction of the work, contended that their liability ceased. *Held*, that the Land Clauses Act applied, and the Company were bound to keep the works in repair. Q. B. *Great Southern and Western Railway Company appellants, Benson respondent* 453

LEASEHOLD CONVERSION ACT.

See LIMITATIONS, STATUTE OF, 2.

LIBEL.

See DEFAMATION.
PLEADING, 4.

LICENSE.

See LANDLORD AND TENANT, 2.

LIFE ESTATE.

See WILL, 1.

LIMITATIONS, STATUTE OF.

See PLEADING, 2.

1. In ejectment by the survivor of two joint-tenants against the devisee of the other, it appeared that, about twenty-seven years before the bringing of the ejectment, the plaintiff and

the defendant's testator, who were joint-tenants under a lease, made an equal partition of the demised premises by parol, and that the moiety allotted to the defendant's testator, and which was the subject of the ejectment, had been in the exclusive occupation of the defendant's testator, and afterwards of the defendant, from the date of the partition until the bringing of the ejectment.

Held, that the exclusive occupation of the defendant and his testator for such a length of time had barred the plaintiff's right, under the joint operation of the 2nd, 3rd and 12th sections of the Statute of Limitations (3 and 4 W. 4, c. 27).

The 12th section of the Statute of Limitations applies not only to the case where one of several joint-tenants has been in possession of "the entirety" of the whole of the lands held jointly, but also to the case where such tenant has been in possession of "the entirety" of any portion of such lands; and the words in that section, "or more than his or their undivided share or shares of such land," apply as well to the case where one of several joint-tenants has been in possession of more than his undivided share in any portion of the lands held jointly, as to the case where he has been in possession of more than his undivided share in the whole of such lands.

The case of *Tidball v. James* (29 L. J., N. S., Exch. 91), observed on and explained. C. P. *Murphy v. Murphy* 205

2. Ejectment on title, for the mountain of S. By fee-farm grant, one of the defendant's granted certain lands to the plaintiff, "together with the mountain and common therewith held and enjoyed before the time of the making of a" certain lease. By patent of 1669, Charles the Second granted lands, of which the lands in the fee-farm grant formed part, to the ancestors of G., "with a proportional part of the unprofitable lands belonging to

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the said towns and lands, according to the number of profitable acres adjudged by Commissioners' certificate."—*Held* that the words in the fee-farm grant granted an undivided proportional share in the mountain, in the proportion that the lands in the fee-farm grant bore to the lands in the patent.

Held, overruling the Court of Queen's Bench, that execution of, and payment of rent under lease, raises presumption of possession under such lease, so as to bar the Statute of Limitations.

Held also, that the Book of Distributions is evidence of title.

Held, by PIGOT, C. B., that a grant made to K., in trust for and on behalf of G., a lunatic, does not make K. a trustee within the 17th section of the Renewable Leasehold Conversion Act.

Held also, by PIGOT, C. B., that if a lessee allows his right against trespassers to be barred by the Statute of Limitations, such right may be revived by fee-farm grant on the expiry of the lease. Ex. Ch. *Poole v. Griffith* 238

MANDAMUS.

1. Application for a *mandamus* to F., an arbitrator appointed pursuant to the Railways Act (Ireland), 1851, to award compensation for injuries to H.'s land, occasioned by certain works of the C. & Y. Railway Company. F. duly made his final award as to said works, in July 1859. The particular works affecting H.'s property were completed in August 1860. H. though duly noticed of the arbitrator's proceedings, made no claim for compensation till November 1862.—*Held*, that H.'s laches precluded the Court from exercising any discretion in his favour.

Held also (*hesitante*, FITZGERALD, J.), that an arbitrator cannot be compelled to amend or supplement his award, after it has been finally made

up pursuant to the statute. *Q. B. Regina v. Fishbourne* 431

2. B, a shareholder duly registered, having paid one call, transfers his shares to one L. F. an infant. The Company refusing to register such transfer, B applied for a *mandamus*.

Held, that this Court should not compel the Company to register a transfer which might be repudiated hereafter by the transferee. *Q. B. Regina v. Midland Counties and Shannon Junction Railway Company* 514

3. B, a duly registered shareholder, having paid one call, transferred his shares to C, a pauper. The Company refusing to register said transfer, B applied for a *mandamus*.

Held, that such transfer, though made to relieve B from liability, was allowed by the statute, if there was no trust for the benefit of B.

Held also (*dubitante* FITZGERALD, J.), that the facts that C was a pauper, in the employment of B, and that the deed of transfer stated a consideration, though none passed, were not sufficient to render the transfer merely colorable.

Held also (*dubitante* FITZGERALD, J.), that though the granting a writ of *mandamus* is discretionary with the Court, the fact that the object of the transfer was to relieve B from liability would not justify the Court in leaving C to his action under the Common Law Procedure Act 1856.

Held also, that the 8 & 9 Vic., c. 16, s. 14, does not render a deed invalid in which a larger consideration is stated than actually passed.

Held also, that where untrue consideration is stated in the deed, the fact that no consideration passed will not render the instrument a deed of gift liable to stamp-duty as such. *Q. B. Same v. Same* 525

4. This was an application for a *mandamus* to compel the Inland Revenue to

pay certain salaries to process-servers appointed by the Recorder of Galway. *Held*, that the writ should go, inasmuch as, under the Civil-bill Act, Recorders had the same rights as to the appointment of process-servers as Assistant-Barristers. *Q. B. Regina v. Ritson* 551

MASTER AND SERVANT.

See NEGLIGENCE, 1.

NEGLIGENCE.

1. In an action against a master, by a servant, for injuries sustained by reason of the incompetence of a fellow-servant, or the negligence of the master, there must be more than *some evidence* of negligence. Mere conjecture and facts consistent with pure accident, and with an error of judgment, as well as with negligence, should not be sent to the jury. *E. Murphy v. Pollock* 224

2. Action under Lord Campbell's Act. Plaintiff, that defendant undertook to carry one M. B. in a certain omnibus, safely, &c., but by reason of the negligence, &c., of the defendant, said omnibus was precipitated into a lock of a certain canal, and the said M. B. was thereby deprived of existence. Defence:—That said M. B. was not deprived of existence by being precipitated into the said lock, or by any negligence of the defendant, after said omnibus was so precipitated, but by the act of a third person not authorised nor employed by the defendant, nor under his control, who, after said omnibus was so precipitated, wilfully let the water into said canal.

Replication:—That the precipitating the said omnibus into the said lock, through the negligence of the defendant, materially contributed to the event whereby, &c.; and the said M. B. would not have been deprived of existence, except for such precipitation. Demurrer thereto.

Held, that, although the death of M. B. was not caused immediately by

OBJECTION.

the act of the defendant, it was such a consequential result of that act as entitled her representative to maintain an action.

Held, by O'BRIEN, J., that allegation in replication, that the negligence, &c., *materially contributed*, was no departure from the plaint. Q. B. *Byrne v. Wilson* 333

OBJECTION, NOTICE OF.

See REGISTRY APPEAL, 1, 2, 8.

OCCUPATION.

See FRANCHISE, MUNICIPAL, 1, 2.
LIMITATIONS, STATUTE OF, 1, 2.

PARLIAMENTARY FRANCHISE.

See REGISTRY APPEALS, 7, 9, 11.

PATENT.

See LIMITATIONS, STATUTE OF, 2.

PAYMENT INTO COURT.

See PLEADING, 1.

PLEADING.

See CONSIDERATION, 1.

DEFAMATION.

GUARANTEE, 1, 2.

NEGLIGENCE, 2.

1. To an action of detinue, the defendant cannot plead payment of money into Court in satisfaction of the value of the goods. *Ex. Moore v. Dublin and Meath Railway Company* 140
2. In an action for the breach of an agreement to execute a lease of lands to the plaintiff, of which he had formerly been in possession, as tenant from year to year; and also for false representation and fraudulent concealment, with regard to the existence of a memorandum of agreement for the lease, the defendant, after issue joined, applied to the Court for leave to plead the Statute of Limitations to the first count, in addition to the defences already on the file.—*Held* [CHRISTIAN, J., *dissentiente*], that, inasmuch as the plaintiff had allowed

RAILWAY COMPANY. 587

himself to be evicted without seeking specific performance of the supposed agreement, and that there were counts on the record on which the plaintiff might recover in case the defendant were guilty of actual fraud in the transaction, that the plea ought to be allowed to be pleaded. *Held also*, that the plea of the Statute of Limitations is a defence on the merits.

Held, per CHRISTIAN, J., that the defendant, having lapsed his opportunity of pleading the above defence in the first instance, was not entitled to the favor of the Court. C. P. *Archbold v. Earl of Howth* 421

3. To an action of assault and battery, a certificate under the 24 & 25 Vic., c. 94, s. 44, may be pleaded, together with a plea that the assault was committed to prevent a breach of the peace. *E. Lawler v. Kelly* App. 1
4. The plaint alleged the printing and publishing of certain libellous words. The defendant pleaded that the said words were part of two separate articles published in the defendant's newspaper, and that "*the said articles* were, and each of them was and is a *bona fide* comment," &c. *Held* bad, the defendant allowed to amend "*and the said words were*," &c. Q. B. *Travers v. Potts* App. 11

PRACTICE.

See PLEADING, 2.

PRISONERS, CONFESSION OF.

See CONFESSION.

PRIVILEGED COMMUNICATION.

See DEFAMATION.

PLEADING, 4.

QUASHING CONVICTION BY JUSTICES, COSTS OF.

See COSTS, 7.

RAILWAY COMPANY.

See LAND CLAUSES CONSOLIDATION ACT.

MANDAMUS, 1, 2, 3.

1. A Railway Company introduced into a special contract for the conveyance of horses at a low rate, a condition exempting themselves "from all liability in respect of" the horses, "whether in the loading, unloading, or in the transit and conveyance of same, or whilst in" the Company's "vehicles, or on their premises."—*Held*, that the condition was in itself unjust and unreasonable.

Held also, that it could not be aided by an alternative condition, whereby the Company offered to "undertake the risk of conveyance only in consideration of an additional payment of £20 per cent. on the low rate of charge;" but refused to entertain any "claim for damage sustained by any animal conveyed at such additional rate, unless the injury" was "stated and pointed out to the Company's agent at the time of unloading," that condition also not being in itself just or reasonable. *Q. B. Lloyd v. Waterford and Limerick Railway Co.* 37

2. Action for not delivering cattle within a reasonable time. B booked cattle from D. to L. without inquiring of the Company as to the hours of the trains. The cattle arrived at R., some distance from L., in due course at 12.30 a.m., but no train left for L. till 10 a.m., when they were forwarded. On a previous occasion B had booked cattle for L. which were forwarded from R. at 3 a.m. This train had been discontinued without any public announcement. The Company never published time-tables of their goods or cattle trains, their arrangements for those trains being contained in a book only used by the Company's servants, and which contained the alteration in question. At the trial, the Judge told the jury that the Company were bound to give the public notice of the change of hours in the departure of their trains.

Held, a misdirection, that the previous dealing, even though coupled with the absence of time-tables, did

REGISTRY APPEALS.

not make the old arrangement as to the starting of the train from R. an element of the contract. *Q. B. Bolland v. Manchester, Sheffield, and Lincolnshire Railway Company* 560

RATING.

See FRANCHISE, MUNICIPAL, 1, 2.

RECORDERS', RIGHT OF, TO APPOINT PROCESS SERVERS.

See MANDAMUS, 4.

REGISTRY APPEALS.

1. Parliamentary Voters Act (13 & 14 Vic., c. 69), sections 22, 23, and 26, form (No. 12) schedule (A).

The notice of objection, form No. 12, schedule (A), must be signed upon the day it purports to bear date. (*HAYES, J., dissentiente*). *Ex. Ch. Parkinson appellant, Brophy and another respondents* 347

2. 13 & 14 Vic., c. 69 (Parliamentary Voters Act, s. 113).

The name and address of the person objected to must be indorsed upon both the notices of objection brought to the postmaster.

An objector gave in evidence a notice of objection, duly stamped by the postmaster, with the name and address of the voter objected to indorsed upon it. The duplicate notice of objection, unindorsed, was delivered by post to the voter, in an envelope directed to the same address as the indorsement of the stamped notice.—

Held, that the notice served was not a "duplicate," and was not duly "directed" to the party objected to (*FITZGERALD, B., and DEASY, B., dissentientibus*). *Ex. Ch. Moriarty appellant, Wynne respondent; Ahearne appellant, Wynne respondent* 359

3. 13 & 14 Vic., c. 69, ss. 22 and 55.

The sufficiency of a voter's qualification is to be determined by the Chairman. When he is satisfied, no appeal lies, even if the voter have parted with some of the lands in respect of which he was originally

placed on the register. *Carroll appellant, Wallace respondent* 367

4. The Chairman is the sole judge of the admissibility of evidence tendered; therefore an appeal, upon the ground that the Chairman had admitted the probate of a will as evidence of a devise, was dismissed. *Carroll appellant, Fisher respondent* 369

5. The heading of the first column in the form of claim, No. 9, schedule A, 13 & 14 Vic., c. 69, runs, "Christian name and surname of the applicant at full length.—*Held*, that "Nathl. Beggs" sufficiently identified Nathaniel Beggs as the claimant. *Carroll appellant, Beggs respondent* 370

6. Although an appeal be dismissed, the Court will not give costs, if in their opinion there has been a miscarriage in the case. *Carroll appellant, Carmichael respondent* 371

7. 2 & 3 W. 4, c. 88, s. 13; 13 & 14 Vic., c. 69, s. 13.

To entitle a claimant to be placed upon the register of voters, in respect of a £20 rentcharge, he must have received some gale thereof six months previous to the 20th of July preceding the revision of the list of voters. *Carroll appellant, Barry respondent* 373

8. 13 & 14 Vic., c. 69, s. 55.—A voter whose name appeared upon the registry refused to prove his right to vote on the mere proof of service of a notice of objection upon him. The Chairman thereupon expunged his name.—*Held*, that the Chairman had not sufficient evidence before him to warrant his decision. *Dickson appellant, Carroll respondent* 374

9. 13 & 14 Vic., c. 69, ss. 5 and 110. A occupied premises in a borough, rated at £9, for twelve months preceding the 20th of July 1864. All rates due were paid in his name; his mother however was rated in respect of the premises in the then last rate,

struck in September 1863. He served a notice of claim to be registered in respect of the premises on the 4th of August, and a notice of objection to his claim was served upon him on the 20th of August. A presented a claim to be rated in the rate-book for September 1863, to the guardians of the union, on the 31st of August.—*Held*, that A was entitled to be placed upon the register, and that the fact of his claim to be registered having been objected to before he claimed to be rated was immaterial, as the effect of the latter claim was to qualify him by relation on the 20th of July preceding: *Agnew, appellant; Kelly, respondent* (2 Ir. Com. Law Rep. 560). *Muldowney, appellant; Malcomson, respondent* 375

10. 13 & 14 Vic., c. 69, ss. 22, 23, 55. A notice of claim need not be signed by the claimant personally. *O'Brien appellant; Fenton, respondent* 380

11. 2 & 3 W. 4, c. 80 (Reform Act) ss. 9 and 13. The 9th section of the Reform Act preserved the right of voting to freemen and all persons entitled on the 31st of March 1831 to vote, by reason of any corporate or other right, and to all persons who, by reason of birth, marriage or service, should at any time thereafter be admitted to their freedom in any city, town or borough.

Therefore, free burgesses elected after the passing of the Reform Act, although resident, do not require a right to vote.—[*FITZGERALD, B., dissente*], *Downing, appellant; Morphy, respondent* 382

RENEWABLE LEASEHOLD CONVERSION ACT.

See LIMITATIONS, STATUTE OF, 2.

RENTCHARGE.

See REGISTRY APPEALS, 7.

RENT, PAYMENT OF, EFFECT OF.

See LIMITATIONS, STATUTE OF, 2.

REPAIR, COVENANT TO.

See WASTE.

REVERSION, INJURY TO.

A landlord sued his tenant for (first) an injury done by the tenant to the landlord's reversion, by (*inter alia*) wrongfully removing from the land large quantities of clay; and for (secondly) a conversion of the same clay.

The jury found that the removal of the clay had depreciated the value of the land by £156; and that the value of the clay itself was £150. A verdict was entered for the former sum.

Held, on motion to increase the verdict, by adding thereto the sum of £150, that the plaintiff was not entitled to receive the value of the clay, as well as compensation for the injury done him by the removal of the clay.—[LEFROY, C. J., *dissentiente*.]
Q. B. *Lord Templemore v. Moore*

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SERVICE OF SUMMONS AND PLAINT, SUBSTITUTION OF.

2. If an attorney is carrying on proceedings for a party in this country, he will be compelled to accept service of a writ in an action against his client, arising out of the same matter, though he is at the time unaware of his client's whereabouts. Q. B. *Purser v. Lucovich*

App. x

SERVANT AND MASTER.

See NEGLIGENCE, 1.

SET-OFF.

By the articles of association of a joint-stock bank it was provided that the directors should be entitled to set apart and receive for their remuneration in each and every year, commencing from the incorporation of the Company, a sum not exceeding £4000, and to divide the same among them as follows, namely, three-fourths to be paid to and divided amongst the

SETTING ASIDE JUDGMENT.

directors forming the board in London, as they shall from time to time determine, and the remaining one-fourth thereof shall be allowed to and divided amongst the directors forming the said board in Dublin, as they may from time to time determine. The defendant was appointed a Dublin director, and acted as such for two years, and at the time of his appointment, a deed of covenant was entered into between him and the Company, by which he covenanted "to act and fill the position of one of the local board of directors in Dublin, at the scale of remuneration provided by the terms and articles of agreement of the said Company." There was one other director of the Dublin board. The board of directors never set apart any sum for the remuneration of directors. An action having been brought against defendant, for a debt alleged to be due by him to the Company, he set off his claim for remuneration of his services as a director. *Held*, that, there having been no setting apart of a fund for this purpose, said claim did not arise. C. P. *English and Irish Bank (limited) v. Gray*

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SETTING ASIDE JUDGMENT.

Motion to set aside judgment, on the grounds of compromise pending, breach of faith, and irregularity of writ. A plaint in ejectment described the lands as situate in the "county of Dublin." The venue, when the writ was issued, was "county of the city of Dublin." Subsequently, but before the writ left the hands of the attorney's clerk, this was corrected, and the writ was then re-sealed. The time to plead expired on 31st of July. Before this a negotiation was going on, and stood over till August 5th, when the defendant's attorney served notice relying on irregularity of writ, and cautioning plaintiff not to mark judgment.—*Held*, that the negotiation was put an end to by the defendant's notice.

SHARES.

Held also (hesitante O'BRIEN, J.), that the writ was not irregular. Q. B. Hanbury v. Jones 442

SHARES, TRANSFER OF.

See MANDAMUS, 2, 3.

SHERIFF, COSTS OF.

See COSTS, 5.

SPECIAL CONTRACT.

See RAILWAY COMPANY.

STATUTE OF FRAUDS.

See LANDLORD AND TENANT, 2.
GUARANTEE, 2.

The defendant, who was superintendent of a cemetery, and required certain books and printed forms for carrying on the business of the cemetery, applied to A to procure them for him. A applied to the plaintiff to execute the order. The plaintiff, who was a stationer and printer, and who had been in the habit of supplying to A books and forms of the kind required, received from A an order for "one of each of the large books, and as few as possible of the small forms." The plaintiff sent a greater number of the large books than were ordered, and a number of the small forms, which the jury found to be in excess of the order; and also a quantity of stationery. The defendant refused to receive any part of the goods sent, on the ground that they were not according to order. At the trial the Judge refused to nonsuit the plaintiff, or direct a verdict for the defendant, but left to the jury the question, whether A was the agent of the defendant for the purpose of accepting the goods; and if so, whether there was an acceptance of the goods by him. The jury found that A was the defendant's agent; and they brought in a verdict for the plaintiff for the price of the goods which they found that A had had authority to order, and did actually order.

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On motion for a new trial, on the ground of misdirection—

Held, that, assuming there was an acceptance by A to satisfy the Statute of Frauds, that did not preclude the defendant from rejecting the goods, on the ground that they were not according to the order.

Held (dissentiente CHRISTIAN, J.), that, as the plaintiff had sent goods in excess of the order, the defendant was not bound to select and accept such part of the goods as corresponded with the order.

That, consequently, the defendant was justified in his refusal to receive any part of the goods; and therefore that there should be a new trial.

Levy v. Green (8 Ell. & Bl. 575; S. C., on appeal, 1 Ell. & Ell. 969) followed. C. P. *Shannon v. Barlow* 479

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.
PLEADING, 2.

STOPPAGE IN TRANSITU.

The consignor, in a bill of lading, loses his right of stoppage *in transitu*, upon the insolvency of the consignee, when, prior to the insolvency, the bill of lading has been transferred, by indorsement, to a purchaser for value, *bona fide*, and without notice of the consignee's insolvency. 18 & 19 Vic., c. 111. E. *Kemp v. Canavan* 216

SUBSTITUTION OF SERVICE OF SUMMONS AND PLAINT.

See SERVICE OF SUMMONS AND PLAINT.

SUMMONS AND PLAINT, IRREGULARITY OF.

See SETTING ASIDE JUDGMENT.

592 SUMMONS AND PLAINT.

SUMMONS AND PLAINT, SUBSTITUTION OF SERVICE OF.

See SERVICE OF SUMMONS AND PLAINT.

SURRENDER.

Upon the surrender to the head landlord, of a farm, held under a lease for lives, upon the day of the surrender, he informed the defendant, a sub-yearly tenant of a house upon the farm, of the surrender by his immediate lessor, and the defendant acquiesced in it. The defendant, who was ploughman, at weekly wages, to the landlord, agreed to continue in possession of the house, as caretaker, until some other house could be procured for him by the landlord. No demand of possession was made by the plaintiff, nor was rent paid by the defendant, who received his weekly wages, and twice inquired if another house had been prepared for him. Upon the defendant's refusal to accept a house offered to him by the plaintiff, the latter dismissed him from his employment,

Upon an ejectment on the title, by the plaintiff—*Held*, that the agreement entered into by the parties amounted to a surrender, in law, by the defendant; his occupation of the house being inconsistent with the possession of any estate in the premises. *E. Lambert v. McDonnell*

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TENANCY IN COMMON.

See LANDLORD AND TENANT, 1.

TENANT IN TAIL.

See WILL, 2.

TITLE.

See LANDLORD AND TENANT, 1.

TIMBER, CUTTING DOWN OF.

See WASTE.

WASTE.

TIME-TABLE OF RAILWAY COMPANY.

See RAILWAY COMPANY, 2.

TROVER.

See REVERSION.

TRUSTEE.

See LIMITATIONS, STATUTE OF, 2.

UNDER TENANCY.

See SURRENDER.

VENUE, CHANGE OF.

See COSTS, 4.

VOTER, QUALIFICATION OF.

See REGISTRY APPEALS, 3, 8, 9.

WAREHOUSE.

See FRANCHISE, MUNICIPAL.

WASTE.

Action by lessor against lessee, on covenant to repair. The lease of L excepted "all timber and timber-like trees, now standing and growing thereon," and contained the usual covenant to keep in repair. The summons and plaint set out the covenant, assigning as breaches that the defendant suffered said premises, and the fences thereof, to be out of repair, and cut down, and allowed to be cut down from off the said lands, a great number of large and valuable trees, &c. At the trial, defendant's Counsel objected to evidence as to the value of the trees cut down, on the ground that they were excepted out of the demise. Verdict for the plaintiff, £10 for the general neglect, and £60 for the trees cut down.

The Court was now moved to reduce the verdict by the latter sum.

Held, that the cutting down the trees excepted was not an act of waste, and therefore, not a breach of the covenant to repair.

Held also, that on the pleading as framed, the defendant was not called on to raise the question as to the exception of the trees, &c., before the trial. Q. B. *Allen v. Carver* 544

WILL.

1. A testator, seised of lands in fee and quasi fee, by his will devised "*all his property, lands, tenements and premises*," at and about the two denominations, and his plate, library, pictures, and furniture, to A. He directed an annuity to be paid to his wife "*out of the rents, issues, dividends, interest and profits of my said estates*." By a codicil, the testator directed that, "*if it should happen that my son A die without heirs of his body lawfully begotten, or to be begotten, in that case, and in default of such heirs*," then his lands of both denominations, charged with the annuity to his wife, and with any reasonable provision A should make for his wife, should, *at A's death descend* to his grandson D, who was to take the testator's name in addition to his own. The codicil also declared that, in case of A's death *without heirs of his body lawfully begotten or to be begotten, in that case, and in default of such heirs*, the testator gave the sum of £6000 to his daughter M. A entered into possession on the testator's death, ex-

ecuted disentailing deeds of both denominations, and died without ever having had issue.—*Held*, that, under the above devise, A took either an estate for life, or in fee, in both denominations, with an executory devise over to D in fee. E. *Coltsman v. Coltsman* 171

2. A will contained a devise in these terms:—"I leave to my brother M. M. my estate T., and the residue of all I possess; and, in case he has no heir, at the demise of said M. M., my estate and freehold to be given to the first heir-at-law." M. M. died without issue, but leaving a widow, who continued in possession till the bringing of the ejectment by the nephew and heir-at-law of both brothers. The widow claiming under a devise to her for life by M. M., who had executed a disentailing deed, under the supposition that he was tenant in tail.—*Held*, that the devise to the first heir-at-law was an executory devise over a limitation in fee, and not a remainder over after an estate tail.

Held also, that the widow's claim to dower out of the lands did not, in the absence of an assignment of dower, give the widow an immediate estate in the lands; and that an ejectment was maintainable without a demand of possession. C. P. *M'Enally v. Wetherall* 503

